

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America,)	
)	
plaintiff.)	APPEAL
)	CR15-00707-PHX-SRB
vs.)	Phoenix, Arizona
)	February 25, 2016
Abdul Malik Abdul Kareem,)	9:34 a.m.
)	
Defendant.)	
)	
)	

BEFORE: THE HONORABLE SUSAN R. BOLTON, JUDGE
REPORTER'S TRANSCRIPT OF PROCEEDINGS
JURY TRIAL - DAY 7
(Pages 1177 through 1318, Inclusive.)

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CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

INDEX OF WITNESSES**KELLI EDMISTON:**

Direct examination by Mr. Koehler	Page 1180
Cross examination by Mr. Maynard	Page 1201
Redirect examination by Mr. Koehler	Page 1206

SEAN RAPER:

Direct examination by Ms. Brook	Page 1208
Cross examination by Mr. Maynard	Page 1218
Redirect examination by Ms. Brook	Page 1223

KAREM FABIAN:

Direct examination by Mr. Koehler	Page 1234
Cross examination by Mr. Maynard	Page 1252
Redirect examination by Mr. Koehler	Page 1257

JEFFREY D. EVANS:

Direct examination by Mr. Koehler	Page 1258
-----------------------------------	-----------

AMY KATHLEEN VAUGHAN:

Direct examination (cont'd) by Mr. Koehler	Page 1282
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CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

INDEX OF EXHIBITS

<u>EXHIBIT NO.:</u>	<u>DESCRIPTION:</u>	<u>RECEIVED:</u>
Exhibit No. 139	Judgment of Conviction	Page 1194
Exhibit No. 266	'Constants on the Path of Jihad', Parts 1-6	Page 1283
Exhibit No. 274	Lecture about a classical book on Jihad, Parts 1-12	Page 1284
Exhibit No. 275	2009 lecture advocating Muslims to restore the honor of Islam, calling for revival of the Khilafah and jihad	Page 1284
Exhibit No. 276	Allah Is Preparing Us for Victory, Part 1	Page 1285
Exhibit No. 277	Allah Is Preparing Us for Victory, Part 2	Page 1285
Exhibit No. 290	Screencap from a video showing a terrified prisoner	Page 1289
Exhibit No. 352	Dark Blue Spiral Memo Book, 3" x 5" (Item 16)	Page 1261
Exhibit No. 356	Spiral Notebook, 8.5" x 11" (Item 18)	Page 1262
Exhibit No. 357	Images from Forensic Analysis of Blue Spiral Notebook (Item 18)	Page 1194
Exhibit No. 358	Google Maps Printouts Dated April 26, 2015, Depicting Culwell Center (Items 19, 20)	Page 1264
Exhibit No. 456	Nextbook photo 8 - protest	Page 1294
Exhibit No. 472	Abdul Malik Abdul Kareem fingerprint card	Page 1194
Exhibit No. 473	Hirens 15.1 CD Table of Contents	Page 1269
Exhibit No. 477	Hirens Boot CD walkthrough	Page 1276

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

P R O C E E D I N G S

(Called to the order of court at 9:34 a.m.)

THE COURT: Good morning, ladies and gentlemen.
Please sit down. The record will show the presence of the
jury, counsel, and the defendant.

The government may call its next witness.

MR. KOEHLER: Your Honor, the United States calls
Kelli Edmiston.

(Witness duly sworn)

THE CLERK: Please state your name for the record and
spell your first and last name.

THE WITNESS: My name is Kelli Edmiston. My first
name is spelled K-E-L-L-I. My last name is spelled
E-D-M-I-S-T-O-N.

THE COURT: You may proceed, Mr. Koehler.

KELLI EDMISTON, WITNESS, SWORN

DIRECT EXAMINATION

BY MR. KOEHLER:

Q Ms. Edmiston, can you tell us where you work, please.

A I'm employed by the Federal Bureau of Investigation.

Q How long have you worked for the FBI?

A For approximately six-and-a-half years.

Q And what is it that you do for the FBI?

A I am a physical scientist, forensic examiner, assigned to
the Latent Print Operations Units at the FBI laboratory.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q And where is your laboratory located?

2 A In Quantico, Virginia.

3 Q And the time in the FBI, has all of that been working in
4 the lab as a latent print examiner?

5 A I have worked five years in my current position as a
6 latent print examiner at the FBI laboratory, but prior to the
7 FBI laboratory, I worked for a different division of the FBI
8 which is known as the Criminal Justice Information Services
9 Division and I worked there for approximately a
10 year-and-a-half.

11 Q And what was that -- what was your work in that division?

12 A I was a fingerprint examiner in which I compared known
13 prints to other known prints.

14 Q So you were still doing fingerprint comparison at that
15 time; is that correct?

16 A That is correct.

17 Q And can you tell us about your training or your
18 educational background, please.

19 A I have a Bachelors of Science and a Master of Science in
20 Forensic and Investigative Science from West Virginia
21 University.

22 Q And can you tell us about the training that you've
23 received at the FBI laboratory?

24 A At the FBI laboratory, I completed an approximate two-year
25 training program. This program involved training by other

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 qualified latent print examiners. I was taught how to
2 properly handle and process items of evidence for the presence
3 and detection of latent prints.

4 I also learned how to properly compare those latent
5 prints using our methodology. I completed a number of
6 examinations, including written exams, oral exams,
7 presentations, and other examinations to include processing
8 and comparisons.

9 Upon completion of all of this training, I
10 successfully completed a comprehensive qualification
11 examination.

12 Q Do you also have additional fingerprint training and
13 experience?

14 A Prior to the FBI laboratory, I completed the training
15 program at the Criminal Justice Information Services Division.

16 Q And what are your current duties in the laboratory?

17 A Currently, I receive, process, inventory items of evidence
18 for the presence and detection of latent prints.

19 I then compare any latent prints that I detect to
20 other latent prints to known prints and I can search them in
21 our automated fingerprint database.

22 I write a report based on my findings and then
23 testify when requested to do so.

24 Q Can you explain to the jury what a "known print" is?

25 A On the palmar surfaces of your hands and on the soles of

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 your feet there's a specialized type of skin. It is called
2 friction ridge skin. It consists of raised portions called
3 friction ridges and valleys in between called furrows.

4 So a known print is the intentional reproduction of
5 the friction ridge skin taken in a controlled environment from
6 a known individual.

7 Typically, this is accomplished by rolling the
8 fingers from one side of the nail to the other in black
9 printer's ink and then, again, from one side to the other onto
10 a white contrasting background. This produces a permanent
11 record for comparison purposes.

12 Q Can you explain to the jury what a "latent print" is?

13 A Throughout the day, certain substances can coat your
14 friction ridges such as oil from touching your hair or your
15 face or from sweat from the sweat pores along your friction
16 ridges. So when an item is touched, there can be a transfer
17 of the friction ridge arrangement onto that item.

18 This is a latent print. It is typically fragmentary
19 and not readily visible, so this is why I use different
20 chemicals, light sources, and fingerprint powders to help make
21 the latent print visible.

22 Q Can someone touch an item and not leave behind a latent
23 print?

24 A Yes.

25 Q How can that happen?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A There are different reasons as to why someone can touch an
2 item and not leave behind a latent print. The factors are how
3 the deposition or how the person touched the item, as well as
4 what happened to the item after the latent print was
5 deposited.

6 And there are different factors such as if the
7 individual had dry or excessively chapped hands, then there's
8 nothing to deposit onto that item for the latent print to be
9 transferred.

10 Also, the opposite is true. If the person is
11 excessively sweaty, then it would just be a smudge without any
12 friction ridge detail.

13 Other factors can have a play such as weather
14 conditions, condensation on a cup, or if the item is dirty or
15 has a textured surface to it. So this acts negatively on the
16 detection of latent prints on those items.

17 And as far as after the latent print was deposited,
18 the latent prints can be fragile on the item such as nonporous
19 surfaces such as this plastic binder that the latent print
20 residue lies on the surface and it can be easily wiped away.

21 Q Can things like weather also affect latent prints?

22 A Yes. Weather can act negatively with latent prints such
23 as the humidity or the moisture in the air.

24 Q What about sunlight?

25 A Yes. This could dry the residue of the latent print.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q What are the basic factors that exist in the use of
2 fingerprints as a means of identification?

3 A The two factors are uniqueness and persistence. Friction
4 ridges are unique. They develop while the fetus is in the
5 womb and they are unique from person to person, finger to
6 finger, and even among identical twins. And this is due to
7 their hereditary and environmental factors as the fetus is
8 developing their friction ridges.

9 And the friction ridges are persistent. They remain
10 unchanged throughout one's life until after death during
11 decomposition, with the exception of permanent scarring or
12 disease.

13 So it is with these two factors of persistence and
14 uniqueness that we can use friction ridges as a reliable means
15 of identification.

16 Q Can you tell us what the methodology is that you use to
17 compare friction ridges?

18 A The methodology that I use is known as ACE-V. This is an
19 acronym and it stands for analysis, comparison, evaluation and
20 verification.

21 Q So what is the analysis portion of that?

22 A Analysis is the first step of ACE-V. It is the
23 information-gathering step. This is when I look at the
24 unknown latent print and I gather as much information as I
25 possibly can.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 I'm looking at the quality and the quantity of
2 information. "Quality" meaning how clear the information is
3 and "quantity" is how much unique or reliable information
4 there is.

5 And while doing this, I look at three different
6 levels of detail. Starting with level one, this is known as
7 the overall ridge flow or pattern type. This is things that
8 do -- the things that occur but can occur in many prints.
9 It's more of a classification and there are three main types
10 or classifications of latent prints.

11 Arches, loops, and whorls.

12 An arch is that type of pattern in which ridges enter
13 upon one side, make a rise or ridge in the middle, and then
14 flow out the opposite side upon which they entered. An
15 arch-shaped pattern -- excuse me --

16 A loop-type pattern is a type of pattern in which
17 ridges enter upon one side, recurve, and then pass out or tend
18 to pass out upon the same side the ridges entered.

19 And a whorl-type pattern is more or less circular
20 circuit formation.

21 Now, looking closer, looking at the specific ridge
22 paths, this is known as Level Two details, looking at specific
23 characteristics. And there are three main characteristics:
24 Ending ridges, dividing ridges, and dots.

25 An ending ridge is a ridge that flows and then stops.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A dividing ridge is a ridge that flows and then
2 splits or divides into two separate ridges.

3 And a dot is like a period at the end of a sentence.
4 It is as long as it is wide.

5 Of importance is not only the type of characteristic
6 but its location, if it has direction, and its spatial
7 relationship to other characteristics and within the print
8 itself. It is all of this information that I consider during
9 Level Two.

10 Level Three is looking even closer at the specific
11 ridge paths, looking at the contours, the ridge edge shapes,
12 and also looking to see if there are pores along the friction
13 ridges. And if present in both the latent print and the known
14 print, then this can be used to help support an identification
15 decision.

16 It is all of this information, all three levels, that
17 I use during analysis to assess the quality and quantity of
18 information.

19 And if I determine there is enough quality and
20 quantity, then this means the print is of value. If the print
21 is of value, this means that if I was presented with the
22 correct known card, I could reach an identification decision
23 and I would not expect that same arrangement to be present in
24 another individual.

25 Q After latent and known prints are analyzed, what is the

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 next step?

2 A The next step is C-4 comparison. This is when I compare
3 and lay the latent print beside the known print and I look for
4 similarities and differences. I look for those different
5 levels of detail; the ridge flow, pattern type, and those
6 characteristics to see if they are in agreement.

7 Q Once you've compared that information, what happens next?

8 A The next step is E-4 evaluation. This is when I reach one
9 of three conclusions; an identification, an exclusion, or an
10 inconclusive decision.

11 An identification decision is when there is enough
12 information in agreement to determine the two prints came from
13 the same source and I would not expect that same amount of
14 agreement to be present in another source.

15 An exclusion decision is when there's enough
16 information not in agreement to determine the two prints did
17 not come from the same source.

18 And inconclusive is when I cannot reach neither an
19 identification nor an exclusion decision. The known print
20 does not have the comparable area. It's either not clear
21 enough or it is just not available.

22 Q What is the final step?

23 A The final step is V-4 verification. This is when another
24 independent, qualified examiner performs their own analysis,
25 their own conclusions, to reach their own decision during

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 evaluation. This is a form of peer review and part of our
2 quality assurance system.

3 Q And do you do that in every single case?

4 A We follow the verification step for identification
5 decisions and single conclusions.

6 Q Were you asked to perform fingerprint comparisons in
7 connection with this case?

8 A Yes.

9 Q Tell us where the evidence that came to you came from.

10 A The evidence in this case came from different locations;
11 partially, from Texas and also from Arizona.

12 Q Speaking to the evidence from Texas, did you develop
13 latent prints or locate latent prints on evidence from Texas?

14 A Yes, I did.

15 Q How many total latent prints did you develop from the
16 evidence in Texas?

17 A I detected 20 latent fingerprints of value.

18 Q And after you developed those prints, did you compare them
19 to known prints of individuals in this case?

20 A Yes, I did.

21 Q Did you develop, compare them to prints belonging to Nadir
22 Hamid Soofi?

23 A Yes.

24 Q Did you also compare them to prints belonging to Elton
25 Simpson?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A Yes.

2 Q Did you also compare them to prints belonging to the
3 defendant Abdul Malik Abdul Kareem?

4 A Yes, I did.

5 Q And was his print card known to you under the name Decarus
6 Thomas as well?

7 A Yes.

8 Q Among the items submitted from Texas, among the latent
9 prints from Texas, did you find any prints of the defendant
10 Abdul Malik Abdul Kareem?

11 A No, I did not.

12 Q Did you find any prints on those items belonging to Elton
13 Simpson?

14 A No, I did not.

15 Q And did you find any prints on those items belonging to
16 Nadir Soofi?

17 A Yes.

18 Q How many prints out of the 20?

19 A 19 latent fingerprints of value were identified to Nadir
20 Hamid Soofi.

21 Q You mentioned that you had 20 latent prints developed.
22 How many items did you examine in order to develop those
23 latent prints?

24 A Approximately 80.

25 Q All right. Let's move on to Phoenix evidence.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Approximately, how many items did you review from Phoenix
2 evidence?

3 A Approximately 95.

4 Q And among those 95, did you find prints of Nadir Soofi?

5 A Yes, I did.

6 Q Did you find prints of Elton Simpson?

7 A Yes, I did.

8 Q Do you recall how many prints for each of those two you
9 found?

10 A If I may refer to my reports, I can provide that number.

11 Q Yes, please.

12 MR. MAYNARD: Your Honor, can I inquire as to the
13 date of the report because there's several.

14 THE COURT: Yes.

15 THE WITNESS: This report was dated January 30, 2016.
16 And for this portion of the case there were nine latent
17 fingerprints that were identified to Nadir Hamid Soofi.

18 In the same report there were 38 latent fingerprints
19 identified to Elton Simpson.

20 In the laboratory reports dated February 12th of
21 2016, in this portion of the case there were 60 latent
22 fingerprints that were identified to Nadir Hamid Soofi and
23 there were two latent fingerprints that were identified to
24 Elton Simpson.

25 MR. KOEHLER: Now, I would like to first draw your

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 attention to Exhibits 114 and 357.

2 May I approach the witness, Your Honor?

3 THE COURT: Yes.

4 BY MR. KOEHLER:

5 Q Can you first open up and take a look at 114 without
6 touching it, please? And that's an item that's in evidence.

7 Do you recognize that?

8 A Yes, I do.

9 Q Did you examine that item as part of your testing in this
10 case?

11 A Yes.

12 Q And did you develop a latent print on that particular
13 item?

14 A I detected one latent fingerprint of value on this item.

15 Q All right. Now, moving on to Exhibit 357, do you
16 recognize that?

17 A Yes, I do.

18 Q And is that another item on which you developed a latent
19 fingerprint?

20 A Yes.

21 Q How many latent prints did you detect on that item?

22 A I detected one latent fingerprint of value on this item.

23 MR. KOEHLER: Your Honor, may I approach the clerk to
24 retrieve Exhibit 139?

25 THE COURT: Yes.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 MR. KOEHLER: May I approach the witness?

2 THE COURT: Well, if you want one of the exhibits to
3 be given to the witness, then the clerk can do that.

4 MR. KOEHLER: Okay.

5 BY MR. KOEHLER:

6 Q Ms. Edmiston, could you please pull that out of the sleeve
7 and examine that. Do you recognize that?

8 A Yes, I do.

9 Q Did you also examine that in the laboratory?

10 A Yes, I did.

11 Q Does that contain an inked fingerprint?

12 A Yes.

13 Q And in your world is an inked fingerprint treated as a
14 known fingerprint?

15 A Yes. It's an intentional, recorded fingerprint.

16 Q Now, I'm going to show you on the monitor, on the document
17 camera, what's been marked for identification as Exhibit No.
18 472. Do you recognize that?

19 A Yes, I do.

20 Q And what is that?

21 A This is a fingerprint card, a known fingerprint card with
22 the fingerprints of Decarus Thomas who is also known as Abdul
23 Malik Abdul Kareem.

24 Q Did you compare the fingerprints that you found on
25 Exhibits 114 and 357, the inked fingerprint on Exhibit 139 to

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 the known fingerprints of Abdul Malik Abdul Kareem on Exhibit
2 472?

3 A Yes, I did.

4 Q What was the result of your comparison?

5 A The prints were from the same source. It was an
6 identification.

7 MR. KOEHLER: I'm going to move to conditionally
8 admit 357 and 472.

9 MR. MAYNARD: No objection.

10 MR. KOEHLER: And 139, the fingerprint portion.

11 THE COURT: Hold on. Wait.

12 357 and 472 are admitted.

13 Do you want to move something else?

14 MR. KOEHLER: Yes, Your Honor. I further move to
15 admit conditionally Exhibit 139.

16 MR. MAYNARD: No objection.

17 THE COURT: 139 is admitted.

18 (Exhibit Nos. 357, 472, and 139 admitted in evidence.)

19 BY MR. KOEHLER:

20 Q Did you also create a demonstrative digital chart to help
21 explain your comparison to the jury?

22 A Yes, I did.

23 MR. KOEHLER: Your Honor, I would like to switch the
24 monitor to the laptop on the lectern here so we can show the
25 jury the demonstrative chart.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 THE COURT: Is there any objection to the
2 demonstrative being viewed by the jury?

3 MR. MAYNARD: I'm sorry. No, Your Honor.

4 MR. KOEHLER: I just realized I may need to come off
5 and come back on. There we go.

6 BY MR. KOEHLER:

7 Q Can you walk the jury through what you did in your
8 comparison to establish that the prints belonged to the same
9 person?

10 A I created charted enlargements illustrating one of the
11 identifications I made in this case.

12 The latent print on your left is the latent
13 fingerprint of value I detected on Government's Exhibit 357, a
14 page from a notebook.

15 You may also notice the context clues of this latent
16 print. In the top right-hand corner there's a hole punch and
17 also at the bottom left-hand corner there are additional
18 holes. And this is where the page can be torn from a notebook
19 page.

20 The known print is the left thumb from a fingerprint
21 card bearing the name Abdul Malik Abdul Kareem.

22 The red letters and red lines were added by me for
23 demonstrative purposes just so you can more easily follow
24 along.

25 Also of note are the black lines. The black lines

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 are the friction ridges and the white areas in between would
2 be the furrows.

3 So starting with analysis, beginning with the latent
4 print first, I'm looking at different levels of detail. And
5 starting with the first level of detail, this is the overall
6 ridge flow and pattern type.

7 Starting at the top of the print, you'll notice that
8 the ridges flow from one side to the other in a curving
9 formation like a rainbow.

10 Now, move your eyes down and you will notice that the
11 ridges become busier. There is more going on. If you look
12 closely, you'll see two looping formations. The top loop is
13 facing what has been designated as characteristic E. And
14 there's a second loop underneath which is facing away from
15 what has been designated as characteristic F.

16 This is a double-loop whorl. It is a specific type
17 of whorl formation. Although it's not a perfect bull's eye,
18 it can still spin around and around like a pinwheel.

19 Now, let's look at the known print to see if this
20 information is in agreement. Looking at the known print
21 starting at the top, you'll notice that the ridges flow from
22 one side over to the other in a curving, arc-like formation
23 like in a rainbow.

24 Now, draw your eyes moving down, the ridges become
25 busier and there is more going on. And you'll notice two

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 looping formations, one on top of the other. This is also a
2 double-loop whorl. And this Level One pattern information is
3 in agreement.

4 And because it is in agreement, we can move on
5 looking closer at the specific ridge paths to see if the Level
6 Two information is in agreement.

7 Moving back over to the latent print, now let's look
8 for unique individual characteristics, those characteristics
9 that I spoke of before; ending ridges, dividing ridges, and
10 dots.

11 Starting with characteristic A, follow the arrow and
12 you'll notice it is pointing to an ending ridge pointing to
13 the left.

14 Now, moving from characteristic A, in the white space
15 move directly to the left. It runs into a second ending ridge
16 pointing to the right. I have designated this as
17 characteristic B.

18 Look closely at characteristic B. To the right there
19 is a little dot beside it. Now, moving from characteristic B,
20 up, across one, two continuous ridges, to a third ridge.
21 There is an ending ridge pointing down and to the left. I
22 have designated this as characteristic C.

23 Now, let's look at the known print to see if this
24 information is in agreement.

25 Starting with characteristic A, this is an ending

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 ridge pointing to the left. Now, moving to the left, in the
2 furrow, the white space, it meets a second ending ridge
3 pointing to the right. This has been designated as
4 characteristic B.

5 Now, notice the little dot beside it to the right.
6 Moving from characteristic B, up across one, two continuous
7 ridges, to a third ridge. There's an ending ridge pointing
8 down and to the left. I have designated this as
9 characteristic C.

10 This Level Two information is in agreement.

11 Now, remember of importance is not only the type of
12 characteristic, whether it is an ending ridge, a dividing
13 ridge, or a dot, but also its location, if it has direction,
14 and its spatial relationship to other characteristics and
15 within the print itself.

16 Looking at the latent print again, let's see if there
17 is more information in agreement.

18 We left off with characteristic C. Moving from
19 characteristic C down, across one, two continuous ridges, to a
20 third ridge, there is an ending ridge pointing to the right.
21 We have discussed this as characteristic B.

22 Moving from characteristic B, directly down, across
23 one, two, three, four, five, six continuous ridges to a
24 seventh ridge, there is a dividing ridge looping to the left
25 and down. I have designated this as characteristic D.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Moving from characteristic D to the left, across one
2 continuous ridge to a second ridge, there is an ending ridge
3 pointing up. I have designated this as characteristic E.

4 Moving from characteristic E, sliding down that same
5 ridge, it meets a second ridge which creates a dividing ridge
6 opening up and curving around towards the right. I have
7 designated this as characteristic F.

8 Now, let's look at the known print to see if this
9 information is in agreement.

10 We left off with characteristic C. Moving from
11 characteristic C down, across one, two continuous ridges, to a
12 third ridge, there is an ending ridge pointing to the right.
13 This has been designated and discussed as characteristic B.

14 Moving from characteristic B, directly down, across
15 one, two, three, four, five, six continuous ridges to a
16 seventh ridge, there is a dividing ridge opening to the left
17 and down. This characteristic has been designated as
18 characteristic D.

19 Moving from characteristic D to the left, across one
20 continuous ridge to a second ridge, this is an ending ridge
21 pointing up. I have designated this as characteristic E.

22 Moving from characteristic E, sliding down that same
23 ridge, it meets a second ridge which forms a dividing ridge
24 which opens up and curves around towards the right. I have
25 designated this as characteristic F. This Level Two

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 information is in agreement.

2 It is with these characteristics that I have charted
3 and explained along with additional characteristics that I
4 have not charted and not explained that I have reached the
5 decision that this latent fingerprint of value that I detected
6 on Government's Exhibit 357, a notebook page, was identified
7 to the left thumb, a known fingerprint card, bearing the name
8 Abdul Malik Abdul Kareem, which is also known as Government's
9 Exhibit No. 472.

10 Q Did you perform the same analysis on the latent print that
11 you discovered on Exhibit 114?

12 A Yes, I did.

13 Q And can you describe what Exhibit 114 is, please?

14 A Exhibit No. 114 is a pistol.

15 Q All right. And then Exhibit No. 139, did you do the same
16 analysis on the inked print on Exhibit 139?

17 A Yes, I did.

18 Q And can you tell us what Exhibit No. 139 is in general
19 terms?

20 A 139 is an intentional recording of a thumb print.

21 Q And is it a Judgment and Commitment Order?

22 A Yes, it is.

23 MR. KOEHLER: I have no further questions for the
24 witness at this time.

25 THE COURT: Mr. Maynard?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 MR. MAYNARD: Yes, ma'am.

2 Your Honor, can I have Exhibit 139 for a moment?

3 THE COURT: Yes.

4 MR. MAYNARD: Sorry, Maureen.

5 May I have 357, Your Honor?

6 THE COURT: That too, yes.

7 **CROSS EXAMINATION**

8 BY MR. MAYNARD:

9 Q Good morning.

10 A Good morning.

11 Q When was it that you completed your fingerprint analysis?

12 A May I refer to my report, please?

13 Q Sure.

14 A The last report for this case was dated February 12, 2016.

15 Q Okay. Now, you've indicated that there was a latent print
16 that was found on Exhibit 114. Do you recall that testimony?

17 A That is correct.

18 Q Do you know where Exhibit 114 was found here in Phoenix,
19 Arizona?

20 A No, I do not.

21 Q Do you know that 114 is a 9 millimeter pistol?

22 A I know that it is a pistol as outlined in my report, but I
23 don't know anything beyond that.

24 Q You don't know if it's the one that Abdul Kareem owned and
25 they found it in his house?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A I did not study that information, no.

2 Q Okay. And as for Exhibit 357, what did you understand it
3 was?

4 A It was a page from a notebook.

5 Q Did you have an understanding of where that notebook was
6 found?

7 A No. I did not study this information.

8 Q All you know is that on all of the items that were found
9 here in Phoenix, you were able to find two fingerprints that
10 you believe belong to Abdul Malik on the items that were given
11 to you?

12 A There were two latent fingerprints of value that were
13 identified, yes.

14 Q Okay. And that on all of the items that you reviewed from
15 Garland, Texas, you weren't able to find any of his prints on
16 that?

17 A That is correct.

18 Q And the items you reviewed from Garland, Texas, did it
19 include weapons?

20 A Yes, it did.

21 Q And did it include shell casings?

22 A Yes.

23 Q And did it include notebooks?

24 A Yes. Papers were involved.

25 Q In fact, there were -- were there paper flags that were

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 found?

2 A That is correct.

3 Q Okay. And his fingerprint was not found on any of that
4 stuff?

5 A Correct.

6 Q Okay. Now, I'm looking at your report that's dated
7 January 30th. I take it this was a preliminary report or is
8 this a final report on these particular items?

9 A It is an official report based on those particular items.

10 Q So you were given items from different locations in
11 Phoenix to analyze?

12 A Yes.

13 Q Now, you not only analyzed the fingerprints of
14 Mr. Soofi -- Nadir Soofi and Elton Simpson, you analyzed those
15 of Decarus Thomas, correct?

16 A That is correct.

17 Q And you also looked for the prints of others, correct?

18 A Yes.

19 Q You were given the prints of a Mr. Abdul Khabir Hyman?

20 A That is correct.

21 Q And on the items that were -- that you looked at from
22 Garland, Texas, you didn't find Mr. Hyman's prints on any of
23 those items, did you?

24 A No, I did not.

25 Q And then according to your report of January 30th of 2016,

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 I believe you looked at like approximately 35 items; is that
2 true? A lot of compact discs, notebooks, and a couple of
3 weapons?

4 A That is correct.

5 Q You did not find Mr. Hyman's prints on any of those items
6 either, did you?

7 A No, I did not.

8 Q Okay. And then you did the report on February 12th of
9 2016, correct?

10 A Yes.

11 Q And, again, you looked at -- it appears that you may have
12 looked at another 60 or 70 items?

13 A Yes.

14 Q Okay. And a large number of those were compact discs?

15 A Yes.

16 Q And you looked at envelopes, tapes, notebooks, things of
17 that nature?

18 A That is correct.

19 Q And you don't know where those items came from that you
20 analyzed?

21 A No, I do not.

22 Q But in looking at all of those items that you analyzed,
23 you didn't -- did you find any of Mr. Thomas's or Abdul
24 Kareem's fingerprints on them?

25 A No, I did not.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q Okay. And did you find any of Mr. Hyman's fingerprints on
2 any of those?

3 A These examinations for this particular report were
4 discontinued based on the trial deadlines of this case, so
5 they were not fully compared to Hyman.

6 Q Okay. So you stopped looking at these items, so you can't
7 testify whether Mr. Hyman's prints are on them or not?

8 A It was a partial examination, so for some of the latent
9 prints I can tell you, but for others --

10 Q No. Can you tell me whether Mr. Hyman's prints are on any
11 of the items that you reviewed that are in your February 12th
12 report?

13 A Hyman at this point was not detected on any of the items,
14 no.

15 Q Now, just for a little bit of clarification, when you were
16 looking at the fingerprints, you showed us that there were six
17 points of identification or characteristic; is that correct?

18 A That is correct.

19 Q When -- is there a standard by which the FBI has to find a
20 certain number of points of characteristic before they
21 determine that there is match?

22 A No. There is no valid or scientific standard for the
23 number of points or a standard because it is the holistic
24 approach of not only looking at the number of points but
25 also --

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q I didn't ask for a lecture. I just wanted to know.

2 Is there a number of points? Yes or no.

3 A No.

4 Q Okay. Are there other law enforcement agencies that do
5 have standards that they have to have a certain number of
6 points before they say that there is a match?

7 A Yes, there are.

8 Q Are there agencies that require as many as 12 to 16 points
9 of identification?

10 A Yes.

11 Q But the FBI doesn't do that?

12 A That is correct.

13 MR. MAYNARD: I have no further questions, Your
14 Honor.

15 THE COURT: Mr. Koehler, do you have any additional
16 questions of this witness?

17 MR. MAYNARD: May I approach the clerk, Your Honor?

18 THE COURT: Yes.

19 **REDIRECT EXAMINATION**

20 BY MR. KOEHLER:

21 Q Mr. Maynard asked you about the Garland evidence and
22 whether Mr. Abdul Kareem's fingerprints were on any of that
23 evidence.

24 Were Elton Simpson's fingerprints on any of that
25 evidence?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A No.

2 Q We talked earlier about weather and moisture and so on
3 affecting fingerprints. Would water affect fingerprints on
4 paper?

5 MR. MAYNARD: Objection. Beyond the scope.

6 THE COURT: Sustained.

7 BY MR. KOEHLER:

8 Q Were any fingerprints at all found on the printed flags
9 that you examined?

10 A May I refer to my case notes and report, please?

11 Q Yes. Please.

12 A There were two latent fingerprints of value detected on
13 the paper flags.

14 Q Were you able to match them to anyone?

15 A Yes.

16 Q To whom were you able to match them?

17 A They were both identified to Nadir Hamid Soofi.

18 Q You, again, testified that you didn't find Mr. Abdul
19 Kareem's fingerprints on any of the firearms in Texas.

20 Those were included in the items you examined; is
21 that correct?

22 A That is correct.

23 Q Is there anything about a firearm that makes it more
24 difficult to retain a print?

25 MR. MAYNARD: Objection. Beyond the scope.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 THE COURT: Sustained.

2 MR. KOEHLER: No further questions.

3 THE COURT: May this witness be excused?

4 MR. KOEHLER: Yes, Your Honor.

5 MR. MAYNARD: No objection.

6 THE COURT: Thank you very much, Ms. Edmiston. You
7 may step down and you are excused as a witness.

8 The government may call its next witness.

9 MS. BROOK: Thank you, Your Honor.

10 The government calls Sean Raper.

11 (Witness duly sworn.)

12 THE CLERK: Please state your name for the record,
13 spelling your first and last name.

14 THE WITNESS: Sean Michael Raper. S-E-A-N.
15 R-A-P-E-R.

16 **SEAN RAPER, WITNESS, SWORN**

17 **DIRECT EXAMINATION**

18 BY MS. BROOK:

19 Q Good morning.

20 A Good morning.

21 Q And if you can speak right into the mic that's right in
22 front of you, it will help everybody be able to hear you.

23 A Yes, ma'am.

24 Q Would you please introduce yourself.

25 A My name is Sean Michael Raper.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q And, Mr. Raper, do you live here in Phoenix?

2 A I do.

3 Q How long have you lived here in Phoenix?

4 A My family and I moved here when I was about 11 years old,
5 so about 15, 16 years ago.

6 Q What do you do for a living?

7 A Right now I'm currently a diesel mechanic.

8 Q What are you? I'm sorry.

9 A I'm a diesel mechanic.

10 Q Okay. And have you been doing that for a while?

11 A About six months. I have been in school for it for almost
12 a year.

13 Q So prior to becoming a mechanic, you were in school?

14 A Yes, ma'am.

15 Q Have you ever sold a gun that you have sold online?

16 A I've sold a few, yes, ma'am.

17 Q Back in December of 2014, did you market for sale online a
18 .38 Special revolver?

19 A Yes, ma'am. It was a Smith & Wesson.

20 Q And how is it that you did that?

21 A I used the website known as BackPage and I went through
22 and posted online there.

23 Q So for those of us that have not posted something on
24 BackPage before, how do you do it? What do you put online?

25 A Well, when you go to BackPage, it's very simple. You just

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 go to post an ad. It will prompt you to put what you're
2 selling, a description, and an e-mail for them to contact you
3 at, a phone number if you choose for them to contact you at,
4 as well as if you choose to upload a couple of photos for it.

5 Q And is that what you did then?

6 A Yes, ma'am.

7 Q Did you list a phone number that somebody who potentially
8 wanted to buy the gun would be able to call you at?

9 A Yes, ma'am.

10 Q And did somebody call you interested in purchasing that
11 particular .38 Special?

12 A There was a text message, yes, ma'am.

13 Q And did you reach out and contact the individual who
14 messaged you?

15 A Yes, ma'am.

16 Q And at some point did you set up a time to meet that
17 person?

18 A Yes, ma'am.

19 Q So did you agree upon a price?

20 A Yes, ma'am. \$300.

21 Q The individual that reached out to you by text message and
22 that you called back to set up the sale, did they identify
23 themselves by name?

24 A Not during the text message, but when we met in person,
25 yes, ma'am.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q So at some point you met this person by -- in person?

2 A Yes, ma'am.

3 Q And what name did the individual provide?

4 A The name that -- I'm bad with names sometimes, but the
5 name that -- in the report back when I was originally
6 interviewed a year ago --

7 Q And have you had a chance to look at the report that was
8 drafted after your interview with FBI a year ago?

9 A Yes, ma'am.

10 Q And in looking at that report, did that report refresh
11 your memory of the name of the individual that you met?

12 A The mark -- beginning with a D -- like DeMarco.

13 Q So the name began with a "D"?

14 A Yes, ma'am.

15 Q Let's move on to the sale itself and we're going to talk
16 about more specifics in the sale.

17 So, you had mentioned that you marketed the gun for
18 sale on BackPage. Had you done that before?

19 A I have done that one other time, yes, ma'am.

20 Q And you arrived upon a location that you were going to
21 meet this individual whose name started with "D"?

22 A Yes, ma'am.

23 Q And where was it that you decided you were going to meet
24 this person to do the sale?

25 A The Caramba's at the cross intersections of 83rd and Union

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Hills.

2 Q Do you remember approximately when it was that you met
3 this person to do the sale?

4 A It was later in the evening, sometime between 8:00 and
5 9:00 p.m., I think.

6 Q So it was later in the evening between 8:00 and 9:00.
7 We've talked about it being in the month of December.

8 Was it early or late in the month?

9 A I think it was closer to the early -- earlier to the mid.

10 Q Okay. So early to mid?

11 A Yes, ma'am.

12 Q And the Caramba's parking lot, why was it that you picked
13 a parking lot?

14 A Well, in dealing with this -- when dealing with a gun sale
15 through BackPage or a private party, it's always a good
16 practice to have a well-lit area with where it's out in the
17 public. And I chose that area because I knew that area. It
18 was decently well lit. And I knew that Caramba's and the
19 other stores around the area had security cameras.

20 Q And so when you arrived at the parking lot that night
21 sometime between eight and nine o'clock, did you park in a
22 particular location in the parking lot?

23 A Yes, ma'am. I pulled in and I parked not right next to
24 but fairly close to an overhead light so that I would be under
25 illumination.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q Okay. So you parked underneath or close to a light.

2 And when you showed up, were you by yourself or with
3 somebody else?

4 A I was alone.

5 Q Eventually that night, did you meet up with the individual
6 who had reached out to you to purchase that .38 Special?

7 A Yes, ma'am.

8 Q And how did that person arrive?

9 A That person arrived in a minivan with himself and two
10 other gentlemen in the vehicle.

11 Q The person that purchased the weapon from you, was he
12 driving or a passenger?

13 A He was driving, ma'am.

14 Q And did the minivan that he parked, did he park close to
15 you or far away from you?

16 A I parked on one side of a median and then there was a
17 concrete area with a little bit of dirt area in between us and
18 he parked on the opposite side of that.

19 Q And could you see -- could you see into the minivan
20 itself? You mentioned that there were two other people in the
21 minivan, so you could see that there were two people in the
22 minivan.

23 How well were you able to see those two people?

24 A The individual that was in the front passenger's seat, I
25 was able to see that he was a skinnier-faced individual, a

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 little bit older. He had a ball cap on.

2 The individual in the back, all I was really able to
3 see was movement. I couldn't get a good view of the
4 individual because the light didn't penetrate that far really
5 into the minivan, but there was two individuals in there.

6 Q Okay. So the man whose name starts with "D" gets out of
7 the car and comes to you?

8 A Yes, ma'am.

9 Q At that point what happened?

10 A At that point I introduced myself. How you doing? Go
11 through the normal pleasantries of feeling the person out when
12 you're selling.

13 I tell him that I have the pistol, does he have the
14 money.

15 I take the pistol out. It's unloaded. I show it to
16 him. I run through what it is. He tells me that he doesn't
17 really need to know. He already knows how to work a revolver.

18 He pulled out the money, a wad of cash, which struck
19 me unusual, because normally, when you go to a gun deal like
20 this, you carry the very basic minimum of what you need; your
21 driver's license, only your car keys --

22 This is how I do it anyways. Your driver's license,
23 your car key, and just enough cash to pay for what was agreed.

24 You don't bring a lot of extra money with you.

25 Q What was the agreed-upon price for the .38 Special?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A \$300 U.S. dollars.

2 Q And you mentioned that he had a wad of cash?

3 A Yes, ma'am.

4 Q So did he give you \$300?

5 A He gave me \$300, yes, ma'am.

6 Q After he -- did he give you the \$300 from the wad of cash
7 he had?

8 A Yes, ma'am.

9 Q And after he gave you \$300 from that wad of cash, how much
10 was left in the wad of cash?

11 A I barely put a dent in it. It looked like -- I mean, I'm
12 not in the habit of scoping people's money out when they're
13 handling it, but it still seemed like he had a good chunk in
14 there left.

15 Q And you said taking off the \$300 barely took a dent out
16 of --

17 MR. MAYNARD: Objection.

18 THE WITNESS: Yes, ma'am.

19 MR. MAYNARD: Objection to the form of the questions.

20 THE COURT: The form of the question sounds like it's
21 leading.

22 MS. BROOK: Okay. I'm just trying to clarify the
23 question.

24 BY MS. BROOK:

25 Q So, after he peeled the \$300 left out of the wad of cash,

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 maybe just show us with your hands how much cash was left.

2 A I mean, the cash was originally approximately about that.

3 Maybe moved not even an inch. (Indicating)

4 Q You had mentioned that you started to explain the
5 specifics of the weapon and that he expressed to you he wasn't
6 interested in the specifics.

7 Did he say anything else to you?

8 A Well, I gave him a box of the ammo. And before we parted,
9 he asked if I knew anybody else that was selling guns or if I
10 had any more ammo or anything along those lines because he was
11 in the market to buy right now.

12 Q Can you describe for us what that man looked like?

13 A The man is the gentleman sitting right over there.
14 (Indicating)

15 Q And can you describe something that he's wearing?

16 A It's a blue and white -- not quite plaid but
17 checkerboard-type shirt, African-American complexion, gray --
18 black hair turning gray, with a -- with facial hair.

19 MS. BROOK: Your Honor, may the record reflect that
20 the witness has identified the defendant?

21 THE COURT: Yes.

22 MS. BROOK: May I have one moment?

23 THE COURT: Yes.

24 BY MS. BROOK:

25 Q Did the defendant tell you what he did for a living?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A He told me that he owned a moving company.

2 MS. BROOK: Your Honor, may I approach with Exhibit
3 125?

4 THE COURT: Yes.

5 MS. BROOK: Let me get back to the mic.

6 Use these if you want to touch it.

7 THE COURT: Well, hold on.

8 THE WITNESS: Yes.

9 THE COURT: I would prefer that he not touch it at
10 all.

11 THE WITNESS: Yes, ma'am.

12 THE COURT: Okay. So you can look inside the box but
13 don't touch the weapon that's in there.

14 THE WITNESS: Yes, ma'am.

15 THE COURT: So go ahead and look in there.

16 Ms. Brook?

17 BY MS. BROOK:

18 Q Do you recognize what's in that box?

19 A Yes, ma'am.

20 Q And what do you recognize it as?

21 A It's a Taurus .38 Special revolver.

22 Q Is that the .38 Special you sold him?

23 A Yes, ma'am. I misspoke earlier when I mentioned Smith &
24 Wesson.

25 MS. BROOK: I don't have any other questions. Thank

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 you.

2 THE COURT: Mr. Maynard?

3 MR. MAYNARD: Thank you, Your Honor.

4 CROSS EXAMINATION

5 BY MR. MAYNARD:

6 Q Good morning.

7 A Good morning, sir.

8 Q When you met this individual, he told you at that time
9 that he owned a moving company, correct?

10 A Yes, sir.

11 Q You were a little bit down on your luck at the time?

12 A Not really, sir. I was working at the power plant. I was
13 considering a move of career. I was doing all right.

14 Q Okay. You recall that you had been interviewed by the FBI
15 before?

16 A Yes, sir.

17 Q And you were interviewed back in June of 2015?

18 A Yes, sir.

19 Q Did you tell them that your wife had just recently left
20 you and that was why you were selling the gun because you had
21 some bills and you needed to get some extra cash?

22 A Back in the month of December, yes, me and my former
23 ex-wife had separated. And, yes, I did sell the gun to help
24 make bills and whatnot, yes, sir.

25 Q And, in fact, I think you told the FBI at the time, did

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 you not, that she had left and she had taken most everything
2 and that was the reason you were selling this gun because you
3 were out of money?

4 A Yes, sir. My paycheck had not come in.

5 Q And she had left in November and this transaction is
6 happening within 30 days of that?

7 A Yes, sir.

8 Q Okay. And he tells you he's got a moving company.
9 Doesn't he give you a copy of his card for the moving company?

10 A No, sir.

11 Q You don't remember getting a copy of a card?

12 A No, sir. I put most cards I receive in my wallet.

13 Q Okay. And did you ever call him back at a later date and
14 offer to sell him a .22 rifle?

15 A Not to my knowledge, sir. I did mention that I had one,
16 but I wasn't interested in selling it.

17 Q Okay. So you don't recall calling him.

18 What number did you advertise on the BackPage?

19 A My cell phone number, sir.

20 Q What was that number?

21 A 623-217-9571, I believe.

22 Q Now, when you came up to sell this gun, you said it was
23 \$300; is that correct?

24 A Yes, sir.

25 Q Do you recall that to be the exact number or is it

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 possible that you sold it for \$350?

2 A I did not sell it for 350, sir. It was \$300.

3 Q And did you also sell a box of ammunition with it?

4 A Yes, sir.

5 Q You didn't remember the make of the gun. Are you sure you
6 remembered the amount?

7 A Yes, sir.

8 Q Okay. And I believe you testified on direct that you have
9 only sold two guns?

10 A I believe, yes, sir.

11 Q Have you ever bought any guns off of BackPage?

12 A No, sir. I find their prices to be a little bit too
13 steep. That's why I know that if I have one that's priced at
14 a good -- good price that it will usually sell.

15 Q How much had you purchased this .38 for?

16 A This .38 Special, I'm not too sure. I think it was
17 probably brand new like 325, 330 before tax.

18 Q And where did -- when did you purchase it?

19 A Earlier in -- earlier that year.

20 Q Like how long before you sold it? Had it been six months?
21 Had you had this gun for six months before you sold it?

22 A I'm not entirely sure.

23 Q No recollection at all?

24 A I have owned multiple different firearms, sir. I can't
25 tell you exactly how long I have owned every single one.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q Okay. Let me show you a Department of Justice National
2 Tracking Center Report.

3 And I'm going to direct your attention to where my
4 finger is and the purchase date of the gun. Do you see that?

5 A Yes, sir.

6 Q And did you purchase this gun in Chino Valley, Arizona?

7 A Not in Chino Valley, sir. I brought it from Tombstone
8 Tactical. That's over by Metro Mall. They have more than one
9 location. That's just their headquarters.

10 Q And does this help refresh your recollection of when you
11 purchased the gun?

12 A Yes, sir.

13 Q When was it now?

14 A Per the paperwork it says 11/12.

15 Q This was only the second time that you had actually sold a
16 gun?

17 A On BackPage, yes, sir.

18 Q BackPage. Had you sold other guns on other websites?

19 A No, sir.

20 Q When you were interviewed by the FBI back in June, were
21 you concerned that they were looking at you for dealing in
22 guns?

23 A No, sir.

24 Q Did you keep a receipt when Mr. Abdul Kareem purchased the
25 gun from you?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A I did do -- I do a bill of sale with my customers that I
2 have sold a gun to or other individuals just for my record.

3 Q And what happened to that receipt?

4 A Well, after December me and my ex tried to reconcile, got
5 back together, moved in with each other. She ended up leaving
6 again before the divorce and taking pretty much almost
7 everything I owned and leaving, including the box that had my
8 paperwork in it.

9 Q She took your receipts then?

10 A Yes, sir.

11 Q Did you recall that you asked this individual if he had
12 any job openings so that you could work for his moving
13 company?

14 A I remember that it was discussed that I might be looking
15 for parttime work on my days off to make a little bit of extra
16 money for the moving company, yes, sir, but nothing ever came
17 of it.

18 Q Okay. Did he tell you because of the time of year there
19 just wasn't a lot of moving going on?

20 A He told me that business was a little bit down but to try
21 and contact him again later if I was still interested.

22 MR. MAYNARD: Just a moment, Your Honor.

23 No further questions, Your Honor.

24 THE COURT: Ms. Brook, do you have additional
25 questions?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 MS. BROOK: Just briefly.

2 **REDIRECT EXAMINATION**

3 BY MS. BROOK:

4 Q Defense counsel asked you a bunch of questions about your
5 memory of this particular sale. Are you sure that you saw the
6 defendant with a wad of bills in his hand after he peeled off
7 the \$300 and handed it to you?

8 A Yes, ma'am.

9 Q And are you sure that the defendant told you after he
10 purchased this .38 Special revolver from you that he was in
11 the market for more guns and wanted to know if you had any
12 more guns for sale?

13 A Yes, ma'am.

14 MS. BROOK: I don't have any other questions.

15 THE COURT: May this witness be excused?

16 MS. BROOK: Yes.

17 THE COURT: Any objection?

18 MR. MAYNARD: No.

19 THE COURT: Thank you, Mr. Raper. You may step down,
20 sir. You are excused as a witness.

21 THE WITNESS: Thank you.

22 THE COURT: You can just leave that box right there.

23 We'll take our morning break and reconvene at eleven
24 o'clock.

25 Ladies and gentlemen, you are reminded of the

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 admonition not to discuss the case among yourselves or with
2 anyone else.

3 Also, please do not form any conclusions about the
4 case until you have heard all of the evidence and begun your
5 deliberations.

6 I will excuse the jury at this time and we will
7 reconvene at eleven o'clock.

8 (Open court, no jury present 10:42 a.m.)

9 THE COURT: Maureen tells me the government has
10 witness problems?

11 MS. BROOK: We have two problems.

12 Can I address the first one, which is Evan Kohlmann?

13 I was notified late last night by Mr. Kohlmann that
14 he has fractured his shoulder in two separate places and was
15 in the hospital in Colorado.

16 He has been told that he cannot fly by the doctor.
17 I'm not sure if he is having surgery today or if they can mend
18 it without surgery.

19 But what I am hoping we can arrange with him is that
20 on Tuesday morning we prepare his testimony and present it via
21 VTC. That way he doesn't have to fly here. Apparently, he
22 needs assistance moving, dressing, changing, sleeping.

23 THE COURT: Now, is he at home?

24 MS. BROOK: He's in the hospital right now in
25 Colorado, I think, but my understanding is the doctors cleared

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 him, eventually when he's released, surgery, or I'm not sure
2 what's going to happen in between, to fly back to New York.

3 THE COURT: So he's not at home --

4 MS. BROOK: No.

5 THE COURT: -- in Colorado. His home is in New York?

6 MS. BROOK: Correct. But he's not cleared to fly
7 otherwise.

8 So my hope is that we can do his testimony much like
9 we did Special Agent Chiappone for the evidentiary hearing
10 where we -- and probably through the same courthouse. Set up
11 a VTC and have him testify that way.

12 THE COURT: Because you anticipate he'll be in New
13 York then?

14 MS. BROOK: Yes. And ready to go on Tuesday is my
15 understanding.

16 THE COURT: Well, I guess we can only hope that's
17 true.

18 MS. BROOK: Exactly.

19 THE COURT: I'm not going to ask Mr. Maynard to
20 respond to that yet.

21 What's the other witness problem?

22 MR. KOEHLER: The other witness problem, Your Honor,
23 is because of the timing and things going a lot faster than
24 anticipated, and frankly, we've stipulated a few things that
25 have omitted some of the foundation issues with some of the

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 witnesses -- with some of the exhibits.

2 We have really kind of run low on witnesses. And
3 this thing with Mr. Kohlmann occupied quite a bit of our night
4 last night, as you can well imagine.

5 We have Ms. Fabian available today and Ms. Vaughan to
6 finish laying foundation for audio today.

7 And then we have Jeffrey Evans, the CART examiner,
8 available to testify. But I spoke to Ms. Plomin this morning
9 and she was unable to open the report CD that we provided her.

10 Exhibit No. 200 is the Hiren's CD. And we asked
11 Agent Evans to examine that last week and he did and produced
12 a report. But unfortunately, Ms. Plomin was unable to open
13 the CD on which it was contained and so she wanted more time.

14 THE COURT: What is a Hiren's -- I know it's in
15 evidence. What is it?

16 MR. KOEHLER: It's a tool kit. It has computer
17 tools. It is a bootable CD that allows you to turn on and
18 operate a computer without starting Windows and it has various
19 tools on the CD that allow a user to both fix things on a
20 computer and stall things on a computer, remove things from a
21 computer, and so forth, without ever running Windows.

22 THE COURT: And so that report was on a CD and the
23 defense was unable to open it?

24 MR. KOEHLER: That's correct.

25 THE COURT: And has that been remedied since then?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 MR. KOEHLER: I provided Ms. Plomin with a copy of
2 the Table of Contents of the CD. I sent it to her via e-mail
3 last night and provided it to her in hard copy form this
4 morning.

5 And that's what I intend to present from Agent Evans
6 with respect to that CD.

7 MS. PLOMIN: Your Honor, I just want to clarify. The
8 report is essentially a copy of the CD that the government has
9 testified was found in Mr. Abdul Kareem's possession.

10 When you open the CD, there are several files on it
11 that I'm unable to open. There are probably three or four
12 folders and several files that I don't know what they are. I
13 can't open them.

14 Mr. Koehler did provide --

15 THE COURT: But are they the things that come with
16 the CD?

17 MS. PLOMIN: I don't know what they are. I can't
18 open anything.

19 MR. KOEHLER: They are. It's called a "logical
20 extraction," Your Honor. There's a folder on there --

21 THE COURT: I don't really need to know.

22 MR. KOEHLER: Okay.

23 THE COURT: It's the things that come on the CD as
24 opposed to this CD being the repository of things that the
25 computer user put on it?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 MR. KOEHLER: Correct.

2 THE COURT: For storage or safety or safe keeping or
3 something?

4 MR. KOEHLER: That's correct.

5 THE COURT: Okay.

6 MS. PLOMIN: I think what the government is saying is
7 that the CD contains tools in order to erase things off of
8 your computer and other types of things.

9 So I have been provided with the report which is just
10 a printout of various things that are on the CD. There is no
11 report from Mr. Evans outlining what he found.

12 I have just been able to look at it briefly this
13 morning, but I haven't been able to go through it and I
14 haven't been able to talk to a computer expert about what all
15 these tools on the CD are or what they mean or what they can
16 do.

17 THE COURT: Well, then while I would want him to
18 testify on direct today, we could defer his cross until
19 Ms. Plomin is ready.

20 So this Ms. Fabian --

21 MR. KOEHLER: Yes.

22 THE COURT: How long do you anticipate her to be
23 testifying?

24 MR. KOEHLER: Not very long, no more than 30 minutes.

25 THE COURT: Okay. And then you're calling

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Ms. Vaughan back?

2 MR. KOEHLER: Correct.

3 THE COURT: How much more does she have to -- oh.

4 Is this because she went now and has looked at or
5 listened to some things that she can tell us about.

6 MR. KOEHLER: Yes. And I need to verify that she's
7 been able to do that.

8 THE COURT: Okay. And then Evans?

9 MR. KOEHLER: Correct.

10 THE COURT: About what -- he's going to tell us what
11 Hiren's 15.1 is?

12 MR. KOEHLER: Correct. In addition, he is going to
13 lay foundation for notebooks that were found in the apartment
14 on 19th Avenue. He was one of the finders on the search
15 warrant.

16 THE COURT: Okay.

17 What is the conclusion on Billy Ferguson?

18 MR. KOEHLER: We are not going to call Billy
19 Ferguson. And that, again, is part of some of the snafus that
20 we have run into.

21 THE COURT: So other than those three and Mr.
22 Kohlmann, what other witnesses does the government still have
23 that it intends to call?

24 MR. KOEHLER: We have Mustafa Hassan and Sayeda
25 Ahmadi.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 THE COURT: And when are they scheduled?

2 MR. KOEHLER: They're scheduled for tomorrow. And we
3 called and they cannot come today. We have --

4 MS. BROOK: We have Richard Henderson.

5 MR. KOEHLER: -- Richard Henderson. And he is flying
6 in from Texas. He will be here tonight and testifying
7 tomorrow.

8 THE COURT: Who is he?

9 MR. KOEHLER: He is a representative of PMC, the
10 manufacturer of the .38 Special magazine -- or not magazine,
11 ammunition that is in evidence, the three boxes from different
12 locations.

13 THE COURT: So he's going to explain the significance
14 of a lot number to us?

15 MR. KOEHLER: Correct.

16 THE COURT: And who else?

17 MS. BROOK: We also have Special Agent Whitson and --

18 THE COURT: Is he your last -- is he the one you want
19 to call last?

20 MS. BROOK: We will call him last tomorrow.

21 Before that we'll call Greg Neville.

22 MR. KOEHLER: Correct.

23 MS. BROOK: And then we have two witnesses for
24 Tuesday.

25 THE COURT: And who is Neville? FBI?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 MR. KOEHLER: Yes. He is an intelligence analyst at
2 the FBI.

3 THE COURT: Is Robert Meshinsky coming back?

4 MR. KOEHLER: I believe briefly, yes.

5 THE COURT: Tomorrow?

6 MR. KOEHLER: Yes.

7 THE COURT: And who is the other witness next week
8 besides Whitson?

9 MS. BROOK: Ali Soofi.

10 THE COURT: Is that the son?

11 MS. BROOK: It's the brother.

12 THE COURT: The brother. And that's it?

13 MR. KOEHLER: That's correct.

14 THE COURT: How many days are you anticipating,
15 Mr. Maynard?

16 MR. MAYNARD: Right now, probably a week. I mean
17 four days.

18 THE COURT: Okay. I'm just trying to --

19 MR. MAYNARD: It could be a little bit longer.

20 THE COURT: I'm trying to get a sense of where we
21 are.

22 So the government should be able to rest, depending
23 on what happens with Mr. Kohlmann, on Tuesday or Wednesday
24 morning at the latest?

25 MS. BROOK: Correct.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 THE COURT: So the defense needs to be ready to go on
2 Wednesday.

3 MR. MAYNARD: Okay.

4 THE COURT: Okay?

5 MR. KOEHLER: Yes.

6 MR. MAYNARD: So we should be prepared to start, say,
7 Wednesday afternoon. There will be motions and things, right?

8 THE COURT: Well --

9 MR. MAYNARD: If you want, I'll have people here in
10 the morning.

11 THE COURT: That's what I'm saying. You need to have
12 people here in the morning because we don't know what's going
13 to happen with Mr. Kohlmann yet.

14 For all we know -- hopefully, this isn't so -- he may
15 be having surgery on Tuesday and won't be able to testify at
16 all. I mean, that's not an impossibility at this moment in
17 time.

18 Plus, we're going to address your motion to exclude
19 him entirely. And if for some reason Kohlmann doesn't
20 testify, whether it's because of your motion or because he's
21 unable to, then you will be able to -- we will be able to take
22 up any motions on Tuesday afternoon.

23 MR. MAYNARD: Okay.

24 THE COURT: Okay. And with respect to -- so here is
25 my last question.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 With respect to the people that are available for the
2 rest of today, Ms. Fabian, Ms. Vaughan, and the other person
3 from the FBI, how long is that going to take? I'm trying to
4 gauge whether we should take a lunch break or just another
5 short break or should we just play it by ear?

6 MR. MAYNARD: Judge, can I -- you guys had told me
7 Detective Herrmann was coming in. Is he not coming?

8 MR. KOEHLER: No.

9 MR. MAYNARD: Okay. You made me prep for him.

10 THE COURT: So we're going to -- all right. Let's
11 just play it by ear. We'll see where we are. And plus, you
12 have to ask Ms. Vaughan.

13 MR. KOEHLER: Yes. And I wanted to inform the
14 defense, Ms. Vaughan prepared a spreadsheet that Ms. Plomin
15 asked on cross-examination about metadata on photographs that
16 were admitted into evidence the other day off of the Nextbook
17 tablet.

18 Ms. Vaughan prepared -- I want to say it was last
19 night -- a spreadsheet that shows the metadata from those
20 files and we need to get that to her for that purpose. But we
21 also gave them the report that you asked the government to
22 provide and we gave that yesterday morning.

23 THE COURT: From the other analyst?

24 MR. KOEHLER: That's correct.

25 THE COURT: Okay. Thank you.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Court is in recess until eleven o'clock.

2 (Recess taken at 10:55 a.m.; resumed at 11:01 a.m.)

3 (Open court, jury present.)

4 THE COURT: Thank you. Please sit down. The record
5 will show the presence of the jury, counsel, and the
6 defendant.

7 The government may call its next witness.

8 MR. KOEHLER: The United States calls Karem Fabian.

9 (Witness duly sworn)

10 THE CLERK: Please state your name for the record,
11 spelling your first and last name.

12 THE WITNESS: Karem Fabian. K-A-R-E-M. And Fabian,
13 F-A-B-I-A-N.

14 MR. KOEHLER: Your Honor, may I approach the witness
15 stand and retrieve the exhibit?

16 THE COURT: Yes.

17 **KAREM FABIAN, WITNESS, SWORN**

18 **DIRECT EXAMINATION**

19 BY MR. KOEHLER:

20 Q I apologize. I believe I mispronounced your last name.

21 Could you please introduce yourself to the jury.

22 A Hi. I'm Karem Fabian.

23 Do you want me to spell my last name?

24 Q No. You spelled it for the clerk.

25 And your first name is Karem; is that correct?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A Karem, yes. Correct.

2 Q Where do you work?

3 A Currently, I'm working ABM Parking Services. It is a
4 garage building.

5 Q And what do you do for them?

6 A I'm a driver.

7 Q And what does that entail for you?

8 A Okay. So what I do, I just provide transportation to
9 patients that are disabled, so I just transport them to these
10 facilities.

11 Q Do you own a cell phone?

12 A Yes.

13 Q Who is your cellular provider?

14 A T-Mobile.

15 Q Back in April of 2015, did you go to the T-Mobile store
16 one night?

17 A I did.

18 Q Do you remember the date?

19 A It was April -- I don't quite remember the day.

20 Q Was it around April 6th of 2015?

21 A It was the beginning of April. I don't exactly know the
22 date, but it was the beginning of April.

23 Q Why did you go to the store that night?

24 A Me and my family were trying for a plan because we were
25 just trying to switch different companies, so we were just

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 basically trying to get a new plan.

2 Q Okay. And if you could please pull the mic a little bit
3 closer and just speak nice and slow for our court reporter,
4 please.

5 A Okay.

6 Q About what time of the day did you arrive at the T-Mobile
7 store?

8 A It had to be around 7:30 or so; 7:30 or 8:00.

9 Q Did you know how late the store was going to be open?

10 A I think they closed by 9:00 or 8:00, so it was just -- we
11 were just there for like a half an hour, 40 minutes.

12 Q And were you there to actually get a new plan or were you
13 just shopping for one at that point?

14 A At that point we were just trying to see what the rates
15 were, what the plans were, so it was just shopping around.

16 Q And the T-Mobile store that you went to, where was it
17 located?

18 A It was located on 7th Avenue and Camelback.

19 Q And what kind of location was this? Was it part of a big
20 shopping mall or a little strip mall? What kind of place was
21 it?

22 A It was like a small shop. There was a few stores around.

23 Q Describe the parking lot and the entryway into the store
24 for us, please.

25 A Describe it?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q Yes. In other words --

2 THE COURT: Was there -- do you have to walk into a
3 building to get to the T-Mobile store? Do you just pull up
4 and there's a sidewalk and then you walk in?

5 THE WITNESS: Yeah.

6 THE COURT: Just describe it in that way.

7 THE WITNESS: Okay. You kind of just pull and then
8 there's just the next -- in front of you, behind you, there's
9 the doors. So it's just kind of like a drive-through and then
10 park and then the stores are right there on the side.

11 BY MR. KOEHLER:

12 Q And so did you pull into a marked parking space in the
13 parking lot?

14 A Uh-huh. Yes.

15 Q Was there a drive-through area between where you parked
16 your car and where you walked into the store?

17 A Yeah. There was a little drive-through, yes.

18 Q And was there a sidewalk in front of the store?

19 A Yeah. There was a sidewalk all across, yeah, the stores.

20 Q And where was your car -- if you walked out of the door of
21 the T-Mobile, was your car to the left or the right of the
22 door of the T-Mobile as you're walking out of the store?

23 A It was actually -- I want to say across. I mean, my car
24 was parked like this (indicating) and then the sidewalk was
25 behind me, so it was behind me.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q Okay. And so you walked out of the store, would you go
2 straight --

3 A Yeah. I would go straight.

4 Q -- across the aisle to your car? You wouldn't have to
5 veer right or veer left to get to it?

6 A Yeah.

7 Q Okay. While you were inside the store, where were you
8 positioned?

9 A I don't know how to describe it. I was just kind of
10 like -- I want to say the store was behind me and my car was
11 pointing that way too.

12 Q I'm actually talking about once you went in the store.

13 When you were talking to the people in the store
14 about your plan, were you at the counter, were you at a table,
15 were you somewhere in the back of the store?

16 A When I walked in, I was at a counter sitting down, sitting
17 down talking to the guy in there.

18 Q Did anything unusual happen while you were at the counter
19 of the store?

20 A Well, the only unusual thing, I'll say, was we were
21 sitting down, me and my brother, and then a guy came in. And
22 he was just kind of like loud. He was kind of loud and he
23 wanted to like just talk to someone.

24 So that was the only thing that caught my attention
25 because we were sitting down and there was just someone coming

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 in and they was just --

2 Q Could you describe his tone of voice?

3 A Upset. I don't want to say he was mad. He just was kind
4 of upset.

5 Q Okay. And did you take note of him for that reason?

6 A No. I just -- I just kind of like turned around and saw
7 the person because he was kind of being loud and that's it. I
8 just went back to shop around for the phones.

9 Q Okay. Did you overhear any of his conversation with the
10 store employees?

11 A The only thing I could remember was that he wanted to talk
12 to someone. He was looking for a number to contact. That's
13 it. Someone he wanted to talk to.

14 Q Did you finish your business inside the store?

15 A No. We just decided to leave. We just got the
16 information and we thought we just decided to come back some
17 other day.

18 Q You mentioned that -- I think you said something about
19 your brother. Who was with you inside the store?

20 A It was my dad, my mom, and brother. It was just us four.

21 Q Did all of you leave the store at the same time?

22 A No -- well, yeah. My brother and my dad left first and
23 then me and my mom left together.

24 Q When your brother and your dad left, did they get in a
25 different car from the one you were riding in?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A Yes, they did.

2 Q And who drove the car in which you road?

3 A I did.

4 Q When you left to go to your car, did your mother go with
5 you?

6 A Yes, my mom did.

7 Q And when you walked from the door to the store, did you
8 walk straight to your car?

9 A I did, yes.

10 Q Did your mother get in the car at the same time as you?

11 A Yeah. We both did at the same time.

12 Q Did you have the radio on in the car?

13 A No. I don't think I did. No.

14 Q Once you got in the car, what happened next?

15 A Okay. So I was -- when I was exiting the store, the same
16 guy that came in, you know, the man looking for a phone or
17 whatever, he was by the sidewalk on the phone.

18 And then me and my mom went to the car. Got in. And
19 when I was backing up, all of a sudden I heard like a -- like
20 a loud noise on my truck. And I was like "whoa."

21 So I just kind of like stopped and looked both ways
22 and then maybe like five seconds later, probably even less, I
23 looked at my right side and there was a guy saying that I hit
24 him.

25 And I was like: What?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 I was like: No.

2 And he said: Yeah, you hit me.

3 And then he said -- he said that -- a bad word. He
4 said: You F-ing hit me.

5 And I was like: No.

6 And then he asked: Do you have insurance?

7 And I was like: Yes, I have insurance.

8 And he asked me for my insurance. I gave insurance
9 to him. I don't know why I did but I gave insurance -- me and
10 my mom were both nervous, so I gave it to him.

11 And then after that, I remember he gave the
12 insurance -- there was a guy in the car on my right side.
13 Right side. And then I remember when he told the guy: Take a
14 picture of this.

15 And then I got out of the car and I told him: Hey,
16 is everything okay? Do you need help?

17 And that's when he's like: No. I'm okay.

18 And he gave me back my insurance card. And then I
19 asked him because there's a Fry's and a Starbucks around
20 there, so I asked him if he needed anything from there or
21 whatever.

22 And he said: No. I'm fine. I'm okay.

23 And he went back -- he went back to the sidewalk and
24 then that's pretty much it.

25 Q So let's start back when you first walk out the door of

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 the car. You said you saw him outside the store?

2 A Yes. He was on the sidewalk.

3 Q What was he doing when he walked outside the store?

4 MR. MAYNARD: Objection, Your Honor. This has all
5 been asked and answered.

6 THE COURT: Sustained. We don't have to go back and
7 do everything twice.

8 MR. KOEHLER: I was going --

9 THE COURT: Well, that question was going to be the
10 second time she was going to tell us he was on the phone.

11 BY MR. KOEHLER:

12 Q So, Ms. Fabian, I would like to have you use the chart
13 over here.

14 With the Court's permission, may I move the chart
15 over here?

16 THE COURT: Yes.

17 He's going to ask you to draw something. It's
18 probably going to be 7th and Camelback and where the store is
19 and the parking lot. Can you do that?

20 THE WITNESS: Uh-huh.

21 THE COURT: Okay.

22 MR. KOEHLER: May the witness approach the chart?

23 THE COURT: Yes.

24 BY MR. KOEHLER:

25 Q And just like the Judge said, why don't you go ahead and

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 just have "north" be to the top of the chart there. And then
2 draw the intersection and show the parking lot and where you
3 parked and where the store was.

4 MR. MAYNARD: Your Honor, may I move so I can see?

5 THE COURT: Yes.

6 THE WITNESS: (Witness drawing.) This is parking and
7 this is my car and then here is T-Mobile.

8 THE COURT: Why don't you go back to the witness
9 stand so you'll have the microphone.

10 THE WITNESS: Okay.

11 THE COURT: And then Mr. Koehler can just clarify or
12 ask you to explain what you drew.

13 BY MR. KOEHLER:

14 Q So, is that chart an approximate depiction of where the
15 door to the store was, where your car is parked, and where the
16 other car was parked.

17 Is the other car the little box in the slot to the
18 right of where it says "my car" on your chart?

19 A Yes. It was like that.

20 Q And then the little door drawn there, is that the door to
21 the T-Mobile store?

22 A Yes. That's the door.

23 Q And then there's a little stick figure to the right of the
24 door. What is that?

25 A Oh. That's kind of where the guy was standing in the

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 sidewalk.

2 Q And so that's where he was when you said you walked out
3 and he was talking on the phone?

4 A Yes.

5 Q Now, when you got in your car, you mentioned that your mom
6 got in the car at the same time. Did you take time to put on
7 your seatbelt?

8 A Uh-huh, yeah. I put my seatbelt on and everything. And
9 then when I was backing up, that's when --

10 Q I want to slow you down.

11 A Sorry.

12 Q I want to take it one step at a time here.

13 The windows to the car, do you know if they were up
14 or down?

15 A They were down.

16 Q Okay. And did you hear anything behind your car before
17 you started to back up?

18 A Huh-uh.

19 THE COURT: No? Is that no?

20 THE WITNESS: No. No.

21 THE COURT: Thank you.

22 BY MR. KOEHLER:

23 Q Tell us what kind of car you drive.

24 A It's a Chevy Malibu.

25 Q Does it make noise when you start the engine?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A No.

2 Q Well, I guess here is my question. Is it an electric car
3 that you wouldn't hear the engine?

4 A Oh, yeah. It was electric car.

5 Q Your car is an electric car? It doesn't have a --

6 A I'm sorry. It's not an electric car. No. No. No. I
7 mean, it didn't make noise. It's just normal.

8 Q Are the brake lights on your car functional?

9 A Yes. They're functional.

10 Q Are your backup lights on your car functional?

11 A Yes. They were fine.

12 Q So when you put the car in reverse, the little white
13 lights come on in the back of the car to let somebody know
14 you're about to back up?

15 A Yes. Correct.

16 Q Was it dark outside?

17 A Yeah. It was 7:00 or 8:00, so it was already dark.

18 Q How fast were you going when you first started to back up?

19 A I wasn't going fast. It was just normal speed. But you
20 put your brake and just kind of like go slow like that. I
21 don't know exactly how fast that is.

22 Q So were you letting off the brake to let your car back up?

23 A Uh-huh. Yes.

24 Q Did you put your foot on the gas pedal and push down on
25 the gas pedal?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A No. I didn't.

2 Q How long was it between the point at which you let off the
3 brake and the time that you heard the noise on the trunk of
4 your car?

5 A Let's see. It was -- the time limit?

6 Q Yes. How much time had passed between when you started to
7 let your foot off the brake to back up and the time that you
8 heard the noise on the trunk of your car?

9 A I don't know. A few seconds. It wasn't much because it's
10 not -- the parking lot where the sidewalk is, so it's not too
11 much difference.

12 Q Okay. Next question.

13 A A few seconds.

14 Q How far out of the parking space were you when you heard
15 the noise?

16 A I don't know exactly how to describe square feet and all
17 that.

18 Q I'm not asking about square feet.

19 Let's look at it this way. You mentioned that he
20 went to the person in the vehicle next to you. Could you see
21 into the vehicle next to you?

22 A Could you repeat that? Sorry.

23 Q Okay. So after --

24 THE COURT: Let me try this.

25 When you heard the noise at the rear of your car, was

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 part of the car still within the parking space or was it all
2 the way out where you would drive through the parking lot.

3 THE WITNESS: When I heard the noise?

4 THE COURT: Yes.

5 THE WITNESS: No. The car was still there.

6 THE COURT: Okay. So you still had -- you still had
7 to back up some more to get out of the parking space and start
8 driving?

9 THE WITNESS: Yeah.

10 THE COURT: Okay.

11 THE WITNESS: So it was kind of like you back up like
12 that and either you go right or left, you know, to exit.

13 THE COURT: But you still had to back up some more?
14 If the noise hadn't happened and you stopped, you still had to
15 back up some more to get completely out of the parking space?

16 THE WITNESS: Uh-huh. Yeah.

17 THE COURT: Okay. Please continue, Mr. Koehler.

18 MR. KOEHLER: Thank you.

19 THE WITNESS: Thank you.

20 BY MR. KOEHLER:

21 Q What did you first do when you heard the noise?

22 A Stop right away.

23 Q Did you put your car back in park?

24 A Yeah.

25 Q Did you not -- did you pull forward back into the space or

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 did you just put your car in park right there?

2 A I stopped. You know what, I stopped. I stopped and
3 then -- because he came over here, so he just started talking
4 to me, so I stopped and just put it in park.

5 Q Okay. When you looked over to the vehicle that was next
6 to you, you mentioned that he went around and handed the
7 person your insurance card -- or which side of the vehicle was
8 he on when he did that?

9 A Okay. So he was on my passenger's side and then I give
10 him my insurance from my window. So he didn't have to go
11 around. He just basically -- the window from the driver's
12 side was open, so he just basically passed it.

13 Q So he reached through the driver's window?

14 A Yeah.

15 Q And did you see something happen inside the vehicle next
16 to you that told you what happened with the insurance card?

17 A No. I just know he gave the insurance to someone in the
18 car and then just told him to take a picture and I saw a
19 little flash of the phone.

20 Q That's what I was asking.

21 So he told someone to take a picture and you saw a
22 flash?

23 A Uh-huh.

24 Q When you saw the flash, could you see what angle you were
25 looking through through the driver's window of the car?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A Huh-uh.

2 THE COURT: Why don't you try a different question.
3 I have no idea what you're asking. And by virtue of the fact
4 that she didn't answer, I don't think she does either.

5 BY MR. KOEHLER:

6 Q When you looked over in that direction to see the flash,
7 how was your car aligned with the car next to you, the one
8 that he reached into?

9 A Well, they were just in the same direction. Like my car
10 wasn't completely parked all the way inside, so just maybe --
11 their car was parked, you know, parked inside, and then mine
12 was just right there next to it.

13 Q Okay. Were your driver and passenger windows aligned with
14 the driver window of that car or were you a little bit behind
15 that car at that point?

16 A A little bit behind.

17 Q And about how many feet would you say you were behind the
18 windows of the driver on that car?

19 A I don't know. I don't know how many feet.

20 Q Okay. How long was it between when he came up to the
21 window and told you that you had hit him and when he asked if
22 you had insurance?

23 THE COURT: Does it matter, Mr. Koehler? I wish you
24 would get to the point.

25 MR. KOEHLER: That's part of the point, Your Honor.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 THE COURT: Well, it's not clear. Why don't you ask
2 her what you want to ask her rather than how many seconds it
3 took to walk to the side of the car.

4 BY MR. KOEHLER:

5 Q Did he immediately ask you about insurance?

6 A So after he say that I hit him and this and that, like
7 probably the next question was if I had insurance; and I say
8 yes.

9 Q Did you hear from your insurance company after this?

10 MR. MAYNARD: Objection -- withdrawn.

11 THE COURT: Go ahead and answer.

12 THE WITNESS: Two days later I received a call from
13 the insurance.

14 BY MR. KOEHLER:

15 Q Did the parking lot have lights in it?

16 A I believe so, yes. I think so.

17 Q Do you remember if the lights were on?

18 A Yes.

19 Q And did you look in your rearview mirror before you backed
20 up?

21 A Yeah. I did.

22 Q Were you able to see the person who was with the person
23 who claimed that you hit him?

24 A No.

25 Q Did you believe that you hit the person who claimed that

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 you hit him?

2 A I did not. I didn't.

3 Q Are you sure you didn't hit him?

4 A I could be more than positive I didn't, because I believe
5 like it happened so quick, like I heard the noise, then five
6 seconds later he was on my right side. That was way too fast
7 for someone to -- you know, if I would have hit the person, so
8 I know I didn't.

9 Q Was he still on the phone when he came up to the
10 passenger's side of the car?

11 A Yeah. He was on the phone the whole time when he was
12 talking to me. He didn't really talk as much. We didn't
13 really get information. He just pretty much I gave him my
14 insurance. That happened. He gave it back to me afterwards.
15 And he went back to the sidewalk and I just went home.

16 Q Did you offer him any assistance when you were there at
17 the parking lot?

18 A Yeah. After when I got out of the car, I asked him, hey,
19 there's a store right there. Do you need anything and he just
20 said: No, I'm okay.

21 Q Is the person that came up to the passenger's side of your
22 car and claimed that you hit him here in the courtroom today?

23 A Yes.

24 Q Could you please point him out and describe an article of
25 his clothing?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A Yeah. He's right there. (Indicating)

2 Q Okay. Can you please --

3 THE COURT: Is it the gentleman who's standing to my
4 left?

5 THE WITNESS: Yeah.

6 MR. KOEHLER: May I have a moment?

7 THE COURT: Yes.

8 MR. KOEHLER: Did you get the name of the person that
9 was with him by chance?

10 THE WITNESS: No.

11 MR. KOEHLER: No further questions.

12 THE COURT: Mr. Maynard, you may cross-examine.

13 **CROSS EXAMINATION**

14 BY MR. MAYNARD:

15 Q Good afternoon -- or good morning.

16 A Good morning.

17 Q Okay. Let me just to try to briefly go through this.

18 You're going in with your family. It's your mom,
19 your dad -- or your mom, your dad, your brother, and you going
20 into a T-Mobile store to look about getting a family plan.
21 Okay?

22 If I were to --

23 THE COURT: Now, all we see are your fingerprints,
24 Mr. Maynard.

25 BY MR. MAYNARD:

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q Is that the T-Mobile store that you went to?

2 A Yep. Yeah.

3 Q All right. So this sort of helps you clarify exactly
4 where everybody is. All right.

5 So what happens is you're going in there. And you --
6 after you're in there, you hear a man come in who seems to be
7 fairly upset with T-Mobile about something?

8 A Uh-huh.

9 Q You have to say either "yes" or "no."

10 A Yes.

11 Q Okay. And he's asking to see a manager. But as far as
12 you can tell, he's upset with them about something?

13 A Yeah.

14 Q And you don't know what it is?

15 A No.

16 Q No. Okay. And then he ends up walking outside and he's
17 standing out on the sidewalk talking on his phone?

18 A Yes.

19 Q And at some point you and your mom walk out because you've
20 come in one car, correct?

21 A Yes.

22 Q Your brother and your dad have come in another vehicle?

23 A Yes.

24 Q Okay. And all four of you then go to your respective
25 vehicles?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A Yeah.

2 Q Correct. And so as far as -- the last time you've seen
3 the guy, he's still standing on the sidewalk near the T-Mobile
4 store talking on his phone?

5 A Yes.

6 Q And you get into your vehicle. You put your seatbelt on
7 and get ready to back up?

8 A Yes.

9 Q Right?

10 A Uh-huh. Yes.

11 Q And you look back but you don't see anybody?

12 A Yeah.

13 Q And you start backing up and all of a sudden you hear
14 something. Obviously, he's behind you, either you've hit him
15 or he's slapped or hit the trunk of your car, correct?

16 A Yes.

17 Q But you didn't see him come up behind you?

18 A No.

19 Q And he's still talking on his phone?

20 A Yes.

21 Q So as far as you know, he's walked up, talking on his
22 phone. He's not paying attention. You've backed up and
23 you've hit him?

24 A Yeah.

25 Q Okay. And then he says, "You've hit me" in a kind of nice

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 way?

2 A Yeah.

3 Q And he comes into the side passenger window which was down
4 at that time?

5 A Yes.

6 Q Okay. And after he said, "You've hit me," he asked you,
7 "Do you have insurance?"

8 A Yes.

9 Q And you get out your insurance card and you give it to
10 him?

11 A Yeah.

12 Q Okay. And he takes that insurance card and gives it to
13 somebody and they take a picture of it in the other vehicle?

14 A Yes.

15 Q You don't see who's in the other vehicle?

16 A No.

17 Q Okay. You apologized to him?

18 A Uh-huh. Yes.

19 Q Okay. Because you're concerned that you've hit him?

20 A Yeah.

21 Q Okay. And you then -- do you ever get out of your
22 vehicle?

23 A Yeah. At that point when -- when I heard the -- seen the
24 flash, I got out of the car and I asked him, "Hey, are you
25 okay? Is there anything I can do?"

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q Sure. And, in fact, you asked him, "Can I take you over
2 and buy you a Starbucks?"

3 A Uh-huh.

4 Q Is that a "yes"?

5 A Oh, yeah.

6 Q And then your brother and dad are there, correct?

7 A No, they're not. They're gone.

8 Q Had they already left or are they still there when this
9 happened?

10 A No. They left.

11 Q So it's just you and your mom?

12 A Yes.

13 Q Okay. So he's says, "No, I think I'm okay," or "I'm
14 okay," or whatever?

15 A Yes.

16 Q Gives you back his card -- or your insurance card?

17 A My insurance.

18 Q And you get in your vehicle. You drive off?

19 A Yes.

20 Q All right. You don't call the police because it's on
21 private property?

22 A Yeah.

23 Q Okay. And you don't know whether or not he ended up going
24 to the hospital the next day, do you?

25 A Yeah -- no. I don't know.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q And you don't know whether or not in a couple weeks after
2 that he ended up going to a hospital -- or to a doctor for
3 treatment, do you?

4 A No.

5 MR. MAYNARD: I don't have any further questions.

6 THE COURT: Anything else, Mr. Koehler?

7 **REDIRECT EXAMINATION**

8 BY MR. KOEHLER:

9 Q After you got out of the vehicle and saw him, did he show
10 any signs of having difficulty moving?

11 A No.

12 Q Did he show any signs of being in pain?

13 A No.

14 He just -- huh-uh.

15 Q Looking back on the event -- before you go there, after
16 you heard the noise, did you check your mirrors again?

17 A No, I didn't.

18 Q When he came around the side, had you seen him getting off
19 the ground or anything?

20 A No.

21 Q Looking back on the event at this point, do you think
22 there is any way that you actually hit him with your car?

23 MR. MAYNARD: Objection, Your Honor. It's been asked
24 and answered and it's beyond the scope.

25 THE COURT: Overruled. You may answer.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 THE WITNESS: I'm sorry. What was it again?

2 THE COURT: I'll read it back: It says:

3 Looking back at the event at this point, do you think
4 there is any way that you actually hit him with your car?

5 THE WITNESS: No.

6 MR. KOEHLER: No further questions.

7 THE COURT: May this witness be excused?

8 MR. KOEHLER: Yes, Your Honor.

9 THE COURT: Is there any objection?

10 MR. MAYNARD: No.

11 THE COURT: Thank you, Ms. Fabian. You may step down
12 and you are excused as a witness.

13 THE WITNESS: Thank you.

14 THE COURT: You're welcome.

15 The government may call its next witness.

16 MR. KOEHLER: May I approach the clerk, Your Honor.

17 THE COURT: Yes.

18 MR. KOEHLER: The United States calls Jeffrey Evans.

19 (Witness duly sworn)

20 THE CLERK: Please state your name for the record,
21 spelling your first and last name.

22 THE WITNESS: Jeffrey D. Evans. J-E-F-F-R-E-Y. "D"
23 as in David. Evans. E-V-A-N-S.

24

25 ///

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 JEFFREY D. EVANS, WITNESS, SWORN

2 DIRECT EXAMINATION

3 BY MR. KOEHLER:

4 Q Good morning. Could you please introduce yourself to the
5 jury.

6 A Good morning. My name is Jeff Evans. I'm an Information
7 Technology Specialist, Forensic Examiner with the FBI.

8 Q How long have you been so employed?

9 A I have been employed at the FBI a little over eleven years
10 now.

11 Q And what do you do for the FBI?

12 A I'm an Information Technologist Specialist, Forensic
13 Examiner. I examine digital evidence, so computers, GPS
14 units, cell phones.

15 Q And are you also a special agent with the FBI?

16 A I am not. I'm on the support side.

17 Q Okay. Do you also participate in the execution of search
18 warrants on occasion?

19 A I do. I'm also a member of the Evidence Response Team, so
20 I participate in search warrants on that behalf. I also
21 participate in search warrants on the behalf of just my normal
22 forensic examiner side of my job.

23 Q And were you a participant in the execution of the search
24 warrant at the apartment of Elton Simpson and Nadir Soofi on
25 May 3rd and 4th of 2015?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A I was.

2 Q And is that an apartment located on 19th Avenue in
3 Phoenix, Arizona?

4 A It is.

5 MR. KOEHLER: Your Honor, if I may have a moment to
6 gather some exhibits to give to the witness.

7 May I approach the witness?

8 THE COURT: You may.

9 BY MR. KOEHLER:

10 Q During the course of the execution of the search warrant,
11 did you find some notebooks?

12 A I did.

13 Q And I want to direct your attention first to Exhibit No.
14 352. Do you recognize that?

15 A Yes.

16 Q What is that?

17 A It is a small notebook, blue in color, along with another
18 sheet from the notebook.

19 Q And with the exception of having been tested, does that
20 notebook -- is that notebook in the same condition it was in
21 which you found it?

22 A It is.

23 MR. KOEHLER: Move to admit 352.

24 MS. PLOMIN: Your Honor, may I please look at it?

25 THE COURT: It's a tiny little notebook.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 THE WITNESS: Sorry.

2 MS. PLOMIN: No objection.

3 THE COURT: 352 is admitted.

4 (Exhibit No. 352 admitted in evidence.)

5 BY MR. KOEHLER:

6 Q Now directing your attention to Exhibit 354.

7 A Yes.

8 Q Can you tell us what that is.

9 A It's a letter-size notebook with -- it appears to be just
10 a back cover to it.

11 Q And did you also find that during your execution of the
12 search warrant?

13 A I did.

14 Q With the exception of having been tested, is that notebook
15 in the same condition in which you found it?

16 A Yes.

17 Q And can you tell us where in the apartment these were
18 found?

19 A I would have to look at the sketch or the original
20 packaging for this.

21 Q I'm going to go to the next one while we find the diagram
22 for you. I want to direct your attention next to Exhibit 356.

23 Can you tell us what that is?

24 A It is a similar notebook to the last exhibit. It looks
25 like a couple pages in addition to the notebook itself.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q Okay. And with the exception of having pages removed for
2 testing, is that notebook in substantially the same condition
3 in which you found it?

4 A It is.

5 MR. KOEHLER: And move to admit 356.

6 MS. PLOMIN: Objection to foundation. Just to
7 clarify where it was found.

8 THE COURT: It was found during the search of the
9 apartment on May 3 and 4 belonging to Simpson and Soofi.

10 MS. PLOMIN: No objection.

11 THE COURT: 356 is admitted.

12 (Exhibit No. 356 admitted in evidence.)

13 MR. KOEHLER: If I may place on the document camera
14 Exhibit No. 203, which is in evidence.

15 BY MR. KOEHLER:

16 Q Mr. Evans, does that help you identify where these items
17 were?

18 A Yes, it dos.

19 Q Can you tell us where you found the items?

20 A So Exhibit 354, item No. 17, was found in room G on the
21 floor on the west side of the room. Let's see, room G is the
22 bedroom.

23 Q This room here? (Indicating)

24 A Yeah.

25 Q And which exhibit was found in that location?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A Exhibit 354.

2 Q Okay. How about 352?

3 A 352 is item No. 16 and that was found in room G on the top
4 drawer of the north cabinet.

5 Q Can you show us where that cabinet is in the room?

6 A (Indicating)

7 Q Thank you.

8 And last there is one more to bring in. Exhibit 356,
9 where was that found?

10 A Exhibit 356 is item No. 18 and that was found in room G on
11 floor on the west side of the room. So that would be room G,
12 west side. (Indicating) That is this item here.

13 Q And, I'm sorry. Did you say that was on the floor as
14 well?

15 A Item 18 is room G, on floor, west side of room, correct.

16 Q Now, directing your attention to Exhibit No. 358.

17 A Exhibit 358?

18 Q And can you look at that -- both sides of that, please.

19 A Okay.

20 Q And can you tell us what that is?

21 A Exhibit 358 is two sheets of paper. It appears to be a
22 printout. Top left corner of the paper it says Naaman.

23 N-A-A-M-A-N. Forest Boulevard. Garland, Texas. Street view.

24 At the bottom of the paper it shows a URL

25 <https://www.Google.com/maps> and then there's a whole nother

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 section of that.

2 Q So looking at the Google Maps part of that www address on
3 there, does that tell you where this image came from?

4 A Yes. This appears to be a printout from a webpage at
5 Google, their mapping software. And from the picture it
6 appears to be --

7 THE COURT: Excuse me. It's not in evidence, so
8 don't show it to the jury.

9 BY MR. KOEHLER:

10 Q Is that a true and correct copy --

11 I'm sorry. Is that in the same condition it was in
12 which you found it?

13 A Yes.

14 MR. KOEHLER: Move to admit 358.

15 MS. PLOMIN: No objection.

16 THE COURT: 358 is admitted.

17 (Exhibit No. 358 admitted in evidence.)

18 MR. KOEHLER: Your Honor, may I approach the witness
19 and gather those from him real quick?

20 THE COURT: Yes.

21 THE WITNESS: That's just the original packaging.

22 BY MR. KOEHLER:

23 Q Mr. Evans, do you have the packaging there on the witness
24 stand?

25 A I do.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q Looking at the packaging, does the packaging tell you what
2 room number or letter these objects came from?

3 A Packaging shows -- it's kind of folded over in there.
4 Three notebooks and two papers. The packaging shows room B
5 next to couch, items 16 through 20.

6 Q And where is room B on the screen there?

7 A Room B is this room right here (Indicating) and this would
8 be the couch in the room. And item 11 -- sorry. I'm circling
9 everything -- is shown right there on the sketch.

10 Q So is that the correct location where these items were
11 found according to your notes?

12 A Yes. According to the package, that is the correct
13 location. And --

14 THE COURT: There's no question at this time, sir.

15 THE WITNESS: Okay. Thank you.

16 BY MR. KOEHLER:

17 Q Do you see item numbers on there -- I'm sorry. I don't
18 even have them. I just realized what the source of the
19 confusion is. May I bring the exhibits back to the witness
20 briefly?

21 THE COURT: Yes.

22 BY MR. KOEHLER:

23 Q Are there two sets of item numbers on those exhibits?

24 A There are.

25 Q And is the second set of item numbers from the FBI

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 laboratory?

2 A It is.

3 Q And is that what caused you to think it was the other
4 place?

5 A It is.

6 MR. KOEHLER: May I now approach the witness and
7 retrieve the items?

8 THE COURT: Yes.

9 BY MR. KOEHLER:

10 Q As part of your duties with CART in this case, did you
11 have the occasion to upload electronic evidence into the FBI
12 CARE system and other systems for others to review?

13 A I did.

14 Q Can you tell the jury which items that you uploaded into
15 the system?

16 A I uploaded -- well, I examined and uploaded into the
17 system for review four different items: A Kyocera,
18 K-Y-O-C-E-R-A, Model C, 5215 cell phone, serial number
19 268435462508389355.

20 I also uploaded -- processed and uploaded a Nextbook
21 tablet, serial No. YFGV0315004231.

22 I also processed a micro SD card within that tablet.

23 I uploaded and processed an RCA tablet serial No.
24 RS061DL8B4194 and the micro SD card within that.

25 And I've also uploaded a Maxwest Gravity 55 cell

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 phone. This particular cell phone has two IMEI numbers, the
2 first being 359020053707854, the second IMEI number being
3 359020053707852 and the micro SD card within that.

4 Q Were those documents -- or, excuse me, documents -- were
5 those electronic devices that had to be unlocked by your
6 Cryptographic Unit in Washington, D.C.?

7 A That is correct. They had to.

8 Q Okay. And did you get the image sets and upload those
9 into your systems?

10 A That is correct. I received the image sets on a DVD from
11 that unit; and using those image sets, processed them in
12 cellular software.

13 Q And did you verify the hash values on those to make sure
14 that they were complete?

15 A I did.

16 Q All right. Do you have Exhibit 200 on the witness stand
17 in front of you; is that correct?

18 A Yes.

19 Q Were you asked to examine that disk?

20 A I was.

21 Q Did you run it through your processing software at the
22 FBI?

23 A I did.

24 Q And did you examine the content of it?

25 A I did.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q Can you tell the jury in general terms what that disk is?

2 A In general terms, this disk here labeled -- hand-labeled
3 Hinres, H-I-R-E-N-S, 15.1, is a bootable CD which allows you
4 to use tools on the CD against computers such as Windows
5 computers.

6 Some of the tools on there are for recovery. If you
7 want to try and search for lost pictures, some of those tools
8 on there are for security reasons.

9 So if you want to, for instance, go in and remove
10 unused data on the computer -- so if there's files that used
11 to be on a computer, some of those -- the tools on this CD
12 here allow you to go and pretty much write over the unused
13 portions of the computer; and other tools allow you to go and
14 delete things such as your browsing history and files such as
15 that.

16 Q In your examination of that disk, did you find a Table of
17 Contents on it?

18 A I did.

19 Q You mentioned a moment ago that it's a bootable CD.

20 What does that mean?

21 A The difference between a regular CD and a bootable CD is
22 it's running its own Operating System.

23 So when I -- if I were to put this in a computer and
24 boot to it, it's not running the Operating System on the
25 computer, the Windows 7 or the Windows 10 on the computer

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 itself.

2 And what that allows is that allows the utilities on
3 the disk a greater access to the files and greater access to
4 the raw drive in the file system. It gives it more
5 functionality. It also leaves less traces of things behind.

6 Q And I'm going to place what's been marked for
7 identification as Government's Exhibit 473 on the document
8 camera.

9 Mr. Evans, do you recognize that?

10 A I do.

11 Q What is that?

12 A That is a text file on the root directory of the CD
13 itself. The name of the text file is "HBCD.txt."

14 Q And is this a true and correct copy of the text file
15 that's in the root directory of that CD?

16 A It is.

17 MR. KOEHLER: Move to admit 473.

18 MS. PLOMIN: No objection.

19 THE COURT: 473 is admitted.

20 (Exhibit No. 473 admitted in evidence.)

21 BY MR. KOEHLER:

22 Q Can you describe in general terms what the content of
23 Exhibit 473 is.

24 A In general terms, this is a -- what a lot of software
25 tools will call a "read-me file." It's directions. It's

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 helping you understand what's on the CD itself, the different
2 utilities, short descriptions of them which you can use off of
3 this bootable CD.

4 Q Among the files on the bootable CD, were there cleaner
5 tools?

6 A There were.

7 Q Can you tell the jury what a "cleaner tool" is?

8 A A cleaner tool is a tool that allows you to go in and do
9 things such as remove your browsing history, possibly remove
10 files left behind when you go and browse the Internet. Other
11 cleaner tools will allow you to go and clean and wipe the
12 unused space on a computer.

13 So when a computer is actually using space to store
14 data and the different picture files and whatnot as you are
15 going through your day-to-day life with your computer, what
16 ends up happening is if you delete it, the data is still there
17 and tools that we use can go and look for this.

18 And these cleaner tools will go and they will
19 identify the unused portions within a file system.

20 So if you are using maybe half of the space on your
21 computer, that other half is unused file system space and it
22 will go through and it will write random data or ones and
23 zeros or all zeros depending on the tool.

24 But it's overwriting what was there, making it so
25 that you cannot go and find possibly deleted files, things

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 along those natures.

2 Q If a cleaner tool has been properly used and you come
3 behind to do a forensic review of a computer, are you able to
4 find the data in free space that would otherwise have been
5 left behind?

6 A If a cleaner tool is properly written and used, you are
7 not able to find that data. It is gone.

8 Q I'm going to turn to -- start at page 4 of the listing
9 here.

10 Starting here where it says "Cleaners." Can you read
11 off the names of the various cleaning tools that are on that
12 list?

13 A Sure.

14 THE COURT: Could you possibly zoom in a little bit
15 on that? It's in smaller print.

16 That's good. Thanks.

17 THE WITNESS: So under the header "Cleaners," the
18 first tool is:

19 All Users Temp Cleaner 1.1: To clean all users temp
20 folders, unwanted Windows files from an offline installation.
21 (Windows Freeware)

22 The second tool is:

23 ATF Cleaner 3.0.0.2: A personal and easy-to-use temp
24 file removal software to clean all user temp folders, Java
25 cache, Opera/Mozilla browser cache, cookies, history, download

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 history, saved passwords etc. (Windows Freeware)

2 The third tool is:

3 CCleaner 3.12.1572: Crap cleaner is a freeware
4 system optimization and privacy tool. (Windows Freeware)

5 Clean up! Version 4.5.2: Removes junk files from all
6 user profiles that accumulate over time and litter your hard
7 drive. (Windows Freeware)

8 The next one is:

9 CloneSpy 2.62: Duplicate file cleanup tool, can
10 optionally create hardlinks to save space.

11 The next one is:

12 Data Shredder 1.0: A tool to Erase disk and files
13 (also wipe free space) securely. (Windows Freeware)

14 Delete Doctor 2.2: Delete files that are hard to
15 delete, Option to delete on reboot or via UNC Name. (Windows
16 Freeware)

17 Duplicate File Finder 3.5: Scans and identify
18 duplicate files. It compares them based on byte for byte
19 comparison ensures 100% accuracy. (Windows Freeware)

20 The last one on the page is:

21 MyUninstaller 1.74: Alternative to the standard
22 add/remove control panel module. (Windows Freeware)

23 The next page it continues with:

24 PC Decrapifier 2.2.8: Removes unwanted
25 preinstalled/bundled software from Windows XP/Vista/7 that

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 usually comes with HP/Dell/Acer etc machines. (Windows
2 Freeware)

3 Print Flush 1.3: To clean the print spool it
4 restarts the print spooler and deletes junk print files.
5 (Windows Freeware)

6 Revo Uninstaller 1.93: Remove unnecessary files and
7 registry entries left behind by incomplete program
8 uninstallation routines. (Windows Freeware)

9 SpaceMonger 1.4: Keeping track of the free space on
10 your computer. (Windows Freeware)

11 SpaceSniffer 1.1.2.0: Find lost space on your disks
12 the easy way. (Windows Freeware)

13 WinDirStat 1.1.2.80: A disk usage statistics viewer
14 and cleanup tool for Windows. (Windows Freeware)

15 THE COURT: Mr. Koehler, it's noon.

16 We're going to break for lunch.

17 And did you confirm that Ms. Vaughan will be here
18 this afternoon?

19 MR. KOEHLER: Yes. She's here.

20 THE COURT: Okay, thank you.

21 Ladies and gentlemen, we will recess for lunch. You
22 are reminded, again, of the admonition not to discuss the case
23 among yourselves or with anyone else.

24 Please do not form any conclusions about the case
25 until you have heard all the evidence and begun your

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 deliberations.

2 Court is in recess until 1:15.

3 (Recess taken at 12:01 p.m.; resumed at 1:21 p.m.)

4 THE COURT: Thank you, ladies and gentlemen. Please
5 sit down. The record will show the presence of the jury,
6 counsel, and the defendant.

7 Ladies and gentlemen, just before I came in, I know
8 that Maureen passed out to you photographs of several
9 witnesses.

10 We thought that that might be a memory aid for you
11 when you're deliberating, not next week, but possibly the week
12 after, so that you might -- it might help you remember who was
13 who in terms of what witness it was.

14 Those pictures are going to be collected back from
15 you. You can't keep them, nor can you take a picture of the
16 pictures.

17 I know that you didn't get pictures of everyone. We
18 have to ask people if they're willing to do it. And some
19 people are and some people are not. So to the extent we get
20 the consent from a witness, we will try to provide you with a
21 photograph with just their name on it.

22 You may continue with your questions of Mr. Evans.

23 MR. KOEHLER: Thank you, Your Honor, and good
24 afternoon everyone.

25 ////

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

DIRECT EXAMINATION (cont'd)

BY MR. KOEHLER:

Q Mr. Evans, during the lunch hour, speaking of memory aids, did you have an opportunity to refresh your recollection about the exhibits we talked about earlier?

A I did.

Q And what did you do to refresh your memory about the notebooks that we talked about?

A I looked at the photographs from the search scene.

Q And based on looking at the photographs and the search scene, are you now confident that it was the living room area where you found those items?

A I am.

Q In what part of the living room?

A It was near the couch in the living room.

Q All right. Now, earlier we were talking about that Hiren's boot CD and you had just finished listing off the contents of that CD; is that correct?

A That is correct.

Q The "Cleaner" particular documents.

Did you have an opportunity to create a clean copy of that boot CD and run it on a computer in your lab?

A I did.

Q And did you capture screen prints as you went through the walk-through of it?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A I did.

2 Q Now, I place on the document camera for you what's been
3 marked for identification as Government's Exhibit 477.

4 Do you recognize that?

5 A I do.

6 Q What is that?

7 A That is the initial screen when you put the boot CD into a
8 computer and the initial startup. It gives you this option
9 screen.

10 Q And are all of the screen captures we're going to see in
11 477 true and accurate copies of the screens as you saw them as
12 you walked through going into the Shredder program on the
13 disk?

14 A They are.

15 MR. KOEHLER: Move to admit 477.

16 MS. PLOMIN: No objection.

17 THE COURT: 477 is admitted.

18 (Exhibit No. 477 admitted in evidence.)

19 BY MR. KOEHLER:

20 Q So this is the startup screen, is that what you're saying?

21 A Yes. This is the initial screen where you choose which
22 portion of the CD you want to use.

23 Q And which portion of the CD did you choose?

24 A I chose the highlighted portion, which is "Mini Windows
25 XP."

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q Now, you mentioned this is Mini Windows XP. What is the
2 difference between that and regular Windows XP, if you know?

3 A This version of XP is designed to run off of the CD
4 itself.

5 Q Does it leave any file storage or anything on the computer
6 when you boot this way?

7 A It does not. It can -- it can actually boot without the
8 hard drive in the computer if you wanted to. So you could
9 just have this CD alone in a computer and it will boot to
10 this.

11 Q All right. And the next page of this, is this the screen
12 that you get?

13 A Yes. Could you zoom -- yes. Thank you.

14 Yes. That's after it's booted into the Mini XP
15 selection.

16 Q Now, is this the Menu for the program right here?

17 A That is correct. That is a link to the Menu for the
18 Hiren's Boot CD Menu.

19 Q And where did you go next from there?

20 A I clicked that link and it opened up this next slide here.

21 Q And did you then browse the folder as the little box says
22 on there?

23 A I believe I clicked the Programs. We'll have to see the
24 next page, but I believe I clicked the Programs Menu Option at
25 the top of that, yes.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Q Okay.

2 A And then once you select Programs, you can go and the
3 different categories come up.

4 And if you choose the Cleaners categories, as you can
5 see here on the screen, it lists all the different programs
6 which we read off earlier from the -- from the read-me file.

7 Q And did you go to the program referred to as Data
8 Shredder?

9 A I did.

10 Q And what did you do from there?

11 A From there, once you select Data Shredder, as you can see
12 on this next screen, it brings up the program itself.

13 And then what I did from this screen so I didn't have
14 to take a lot of screenshots, it's hard to read, I copied out
15 the text which you can see in the scroll box in the middle
16 there.

17 Q Okay. And then did you paste that text into a file?

18 A I did.

19 Q And is this next document the file to which you pasted it?

20 A It is.

21 Q This might be a little bit hard to read. Okay.

22 Can you explain in laymen's terms what this is
23 telling you about what this program is capable of doing?

24 A So the section highlighted "Cleaning Disk Free Space," in
25 laymen's terms, if you're using maybe half of your computer

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 drive space, so you have so many files, pictures, any type of
2 file that you store on the drive, any type of file that the
3 Operating System or your Browser is storing on the drive,
4 there's unused space.

5 So as you start filling it up, sometimes your
6 computer will tell you that, you know, you only have so much
7 percentage left.

8 What this program is describing here is it's going
9 through that unused space, the parts of the computer hard
10 drive where previously something could have been stored like a
11 deleted file, and it's going through and it wants to remove
12 that data.

13 Q And what method does it use to remove that data?

14 A It's either going to overwrite the data with random data
15 or ones and zeros. I'm not specifically sure exactly what the
16 details on the method.

17 But it's going through. It's identifying the unused
18 space within the File System on the computer. And it's
19 overwriting that to get rid of any remnants of files that may
20 or may not be there.

21 Q Can you read where it says:

22 The proper solution is to overwrite the file.

23 And then read the number 2 option under that.

24 A Which paragraph down are we talking about?

25 Q Right here. (Indicating)

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 A All right. "The proper solution is to overwrite the file
2 with meaningless data before deleting it, which is exactly
3 what shredder does. There are several methods available,
4 varying in speed and reliability.

5 Method one: Random overwrite. This is the simplest
6 but least secure method. It merely overwrites the file one or
7 more times with pseudo-random bytes. The number of passes
8 (overwrites) can be specified."

9 Option number 2: DOD --

10 THE COURT: Okay. Could you slow down because the
11 court reporter is trying to take down as you read and you're
12 reading really fast.

13 THE WITNESS: I can.

14 Option No. 2: DOD. (Department of Defense) clearing
15 and sanitizing standard. This is a more secure but slower
16 method. The file is overwritten with zero bytes, then with
17 bytes 0xFF (255) and finally with random data.

18 Option No. 3: Gutmann method. This is a very slow
19 but most secure method. The above two methods make it
20 impossible to recover shredded data with software tools, but
21 may fail when an attacker is equipped with specialized disk
22 restoration hardware, which can uncover even several layers of
23 data previously written to any disk track. The Gutmann method
24 uses 26 overwriting passes, each of which addresses different
25 disk encoding scheme (MFM, RLL, etc.). There are also a few

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 random passes. It should be impossible to recover the
2 original data after shredding a file with this method.

3 BY MR. KOEHLER:

4 Q And then what is this screen here?

5 A This screen is the -- two slides ago there was a "Next"
6 button and when you hit the "Next" button, it brings up this
7 screen here.

8 Q And is that where you go on to actually use the program
9 and shred files if you were going to do that?

10 A Yes.

11 Q If someone were to use this disk properly, first off,
12 would there be any trace left by Hirens on the computer that
13 that disk had been used specifically on the computer?

14 A So normally when you boot up a computer and log into an
15 Operating System, you may or may not type in a password but
16 there's going to be log files that change, there's going to be
17 user information that gets updated, even when a computer just
18 boots normally.

19 So what happens in this case is we're booting to the
20 CD and we're not necessarily reading or writing anything on
21 the drive. So unless you go and use some of these different
22 utilities, nothing should change on the drive.

23 So there is nothing -- there's no normal indication
24 that when you boot this CD up on a computer that it was used.

25 Q And if you use this disk to erase a particular file using

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 the Data Shredder, would that file leave traces behind that
2 would be recoverable?

3 A That file would not leave traces behind if you used the
4 Data Shredder to delete it.

5 MR. KOEHLER: I have no further questions.

6 THE COURT: Ms. Plomin, did you wish to defer your
7 cross-examination until tomorrow morning?

8 MS. PLOMIN: Yes, Your Honor.

9 THE COURT: Thank you.

10 Mr. Evans, you may step down and you will be subject
11 to recall. Tomorrow Mr. Koehler will let you know what time
12 you need to be here.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: The government may call its next witness.

15 MR. KOEHLER: The United States recalls Amy Vaughan.

16 **AMY KATHLEEN VAUGHAN, WITNESS, SWORN**

17 **DIRECT EXAMINATION (cont'd)**

18 BY MR. KOEHLER:

19 Q Good afternoon, Ms. Vaughan.

20 A Good afternoon.

21 Q When we spoke before, there were a few exhibits that there
22 was some glitches that you had some trouble listening to
23 audio; is that correct?

24 A Yes.

25 Q Have you since had an opportunity to compare Government's

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Exhibits 266, 274, 275, 276, 277, and 278 against the original
2 audio that was found on the desktop computer?

3 A Yes, I have.

4 Q And starting first with Exhibit 266, Constants On The Path
5 of Jihad, is the audio that's in Government's Exhibit 266 a
6 match to the audio file that was on the desktop computer?

7 A Yes.

8 MR. KOEHLER: Move to admit 266.

9 MS. PLOMIN: One moment, Your Honor. No objection.

10 THE COURT: 266 is admitted.

11 (Exhibit No. 266 admitted in evidence.)

12 BY MR. KOEHLER:

13 Q Now, moving on to 274, have you compared the audio of the
14 lecture of the classical book on Jihad Parts 1 to 12 with the
15 exhibit audio with the audio that came off of the desktop
16 computer?

17 A Yes.

18 Q And is that a match?

19 A Yes, it is.

20 MR. KOEHLER: Move to admit 274.

21 MS. PLOMIN: I would just like to clarify the desktop
22 computer that was found in Simpson and Soofi's apartment?

23 THE COURT: Which computer is it that you made the
24 comparison with these exhibits?

25 THE WITNESS: That would be the tower computer.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 THE COURT: That was found in the Simpson/Soofi
2 apartment?

3 THE WITNESS: Yes, ma'am.

4 THE COURT: Thank you.

5 Is there any objection?

6 MS. PLOMIN: No, Your Honor.

7 THE COURT: 274 is admitted.

8 (Exhibit No. 274 admitted in evidence.)

9 BY MR. KOEHLER:

10 Q Now, moving on to 275, the 2009 lecture advocating Muslims
11 to restore the honor of Islam, did you review that particular
12 audio?

13 A Yes.

14 Q And did you compare it to the audio from the tower desktop
15 computer?

16 A Yes.

17 Q And is it a match?

18 A Yes.

19 MR. KOEHLER: Move to admit 275.

20 MS. PLOMIN: No objection.

21 THE COURT: 275 is admitted.

22 (Exhibit No. 275 admitted in evidence.)

23 BY MR. KOEHLER:

24 Q And now moving on to 276. Allah Is Preparing Us For
25 Victory, Part 1. Did you review the audio exhibit for that

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 and compare it to the audio from the desktop tower computer?

2 A Yes.

3 Q And was that a match as well?

4 A Yes.

5 MR. KOEHLER: Move to admit 276.

6 MS. PLOMIN: No objection.

7 THE COURT: 276 is admitted.

8 (Exhibit No. 276 admitted in evidence.)

9 BY MR. KOEHLER:

10 Q Same question for Allah Is Preparing Us For Victory, Part
11 2. Did you review that?

12 A Yes.

13 Q Also a match?

14 A Yes.

15 MR. KOEHLER: Move to admit 277.

16 MS. PLOMIN: No objection.

17 THE COURT: 277 is admitted.

18 (Exhibit No. 277 admitted in evidence.)

19 MR. KOEHLER: That's all I have for now, Your Honor.

20 THE COURT: Ms. Plomin?

21 MS. PLOMIN: No questions, Your Honor.

22 THE COURT: May Ms. Vaughan be excused as a witness?

23 MR. KOEHLER: Yes. She may.

24 THE COURT: Any objection?

25 MS. PLOMIN: Not at this time, Your Honor.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 THE COURT: You just said "not at this time," but I'm
2 going to excuse her, which means she won't be back.

3 MS. PLOMIN: Okay.

4 THE COURT: Okay?

5 All right. Thank you, Ms. Vaughan. You may step
6 down and you are excused as a witness.

7 MR. KOEHLER: Your Honor, as we discussed previously,
8 that is all we have for today.

9 THE COURT: Ladies and gentlemen, the reason that
10 that's all they have for today is because we're running ahead
11 of schedule and so witnesses had been slotted in, assuming
12 they would take a little bit longer than they took.

13 So we are going to recess until tomorrow morning --
14 or at least the jury I'm going to excuse until nine o'clock
15 tomorrow morning.

16 Based on my discussions with counsel, we are
17 anticipating that the government will complete its
18 presentation of the evidence either probably Wednesday
19 morning, and then the defense will begin calling their
20 witnesses. So we were -- as I said, we are not just on
21 schedule, but a little bit ahead of what the anticipated
22 schedule was.

23 I also wanted to let you know, just for your own
24 planning purposes, that next Thursday, so a week from today,
25 which is Thursday, March 3rd, we will only be in trial in the

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 afternoon but not in the morning.

2 So with that update, ladies and gentlemen, I will
3 excuse you until nine o'clock tomorrow morning and remind you,
4 again, of the admonition not to discuss the case or forms any
5 conclusions about it until you have heard all the evidence and
6 begun your deliberations.

7 We will see you tomorrow morning at 9:00 a.m.

8 I'm going to stay here and talk to the lawyers.

9 (Open court, no jury present at 1:39 p.m.)

10 THE COURT: Thank you. Please sit down.

11 Did you want to talk about the exhibits, the
12 photographs that we had talked about last night and I have
13 reviewed, the ones that the government is offering?

14 And I wasn't able to determine if the ones that are
15 tagged by Mr. Maynard are additional ones or not. The two I
16 looked at randomly are the same, and so maybe there's some
17 additional ones. And as we go through them, I can eliminate
18 the ones that are the same.

19 MR. KOEHLER: That's what we had done in advance.
20 And I think Mr. Maynard flagged some of the same ones that we
21 had already elected we were going to withdraw.

22 And if I can have just a moment, I need to find my
23 list where I have my notes written on it.

24 THE COURT: So I want to save 157 -- because it's
25 many pages -- to the end of our discussion. Other than that,

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 I want to go in numerical order.

2 And the first one is Exhibit 289 which is a
3 photograph of a blind-folded individual with a machete at the
4 back of his neck, appearing that the photo was taken just
5 before he was beheaded.

6 MR. KOEHLER: Correct.

7 MR. MAYNARD: Judge, I think the first one is 287.

8 THE COURT: I don't have 287 on my list.

9 MR. KOEHLER: We're not offering 287.

10 MR. MAYNARD: Okay.

11 THE COURT: Okay. So 287 is not being offered.

12 MR. MAYNARD: Okay.

13 MR. KOEHLER: Correct.

14 MS. BROOK: Your Honor, do you mind if I stand up
15 here as well so I can look over his shoulder?

16 THE COURT: No.

17 MR. MAYNARD: Judge, 289 is also the same as 298.

18 MR. KOEHLER: And we're withdrawing 298.

19 THE COURT: That wasn't on my list either.

20 MR. KOEHLER: Among the ones that we've laid
21 foundation for that we still want to offer, those are the ones
22 that are on the handwritten sheet.

23 Should I read that in just for the record or no?

24 THE COURT: Well, I'm going to go through them one by
25 one.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 MR. KOEHLER: All right.

2 THE COURT: So 289 that I have just described, you're
3 objecting to that on 403(b)?

4 MR. MAYNARD: Yes.

5 THE COURT: The next one is 290 which is a photograph
6 that depicts two images, presumably of the same person; one in
7 black and white and one in color. And in the second image
8 that's in color, the individual appears to be kneeling with
9 his head forward and that's all I can see.

10 MR. MAYNARD: I don't have an objection to that one,
11 Your Honor.

12 THE COURT: Okay. So without objection, 290 is
13 admitted.

14 (Exhibit No. 290 admitted in evidence.)

15 THE COURT: The next one?

16 MR. MAYNARD: I think the government has withdrawn
17 291.

18 MR. KOEHLER: No. We're not withdrawing 291.

19 My suggestion on 291 is that we obscure, using a tool
20 in PhotoShop, to essentially fuzz out that portion of the
21 image to render it --

22 THE COURT: I'm not going to rule on an exhibit that
23 I haven't seen. So 291 that's presently marked is refused.

24 And if you wish to substitute a different 291, we can
25 take it up at such time as there is a substitute.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 But when you say you're going to fuzz it, I still
2 don't know what it's going to look like until I actually see
3 it.

4 MR. KOEHLER: Okay. We will do the same with 293 and
5 310.

6 THE COURT: Okay. So at the present -- as they are
7 presently marked, 293 and 310 are refused.

8 MR. KOEHLER: Next is 292.

9 THE COURT: 292 also appears to be an image of an
10 individual, a different scene than 289, who may be about to be
11 beheaded. And are you objecting to this, Mr. Maynard?

12 MR. MAYNARD: Yes.

13 THE COURT: Okay. I'm not going to rule -- I'm going
14 to put those all together, because part of the 403(b) analysis
15 is looking not at them one at a time, but looking at them all
16 together.

17 The next is 297. It's two photographs on one page,
18 both depict an individual who is blind-folded. And the second
19 image is very similar to 289 in that this individual is in the
20 same posture with a machete over the back of his neck and
21 leaning over a stump appearing about to be beheaded.

22 I assume the government -- or the defendant objects
23 to this one also?

24 MR. MAYNARD: I do. And just to make sure the record
25 is clear, is it correct then that 294, 295, 296, and 297 have

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 been withdrawn?

2 THE COURT: Were they offered?

3 MR. MAYNARD: I thought they were.

4 MR. KOEHLER: 294, '95, '96 have not been offered and
5 they are withdrawn.

6 MR. MAYNARD: What about 297?

7 MR. KOEHLER: That's the one we're presently
8 discussing.

9 MR. MAYNARD: All right. They're not being offered.

10 THE COURT: And the government is not offering 289
11 and 299?

12 MR. KOEHLER: We are offering 289.

13 THE COURT: I'm sorry. I transposed. 298 and 299.

14 MR. KOEHLER: That's correct.

15 THE COURT: Okay. 300 has already been admitted.

16 So the next one is 304. So the government is not
17 offering 301 through 303, correct?

18 MR. KOEHLER: That is correct.

19 THE COURT: Okay. So let's look at 304. And this is
20 an image of a man shirtless but with a hood over his head
21 about to be beheaded, kneeling in a dirt or desert-like area.

22 The government -- or the defense objects?

23 MR. MAYNARD: We do.

24 THE COURT: Why is there a red circle around the
25 image of one of the people in the background?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 MR. KOEHLER: We don't know. That's part of the
2 original image.

3 THE COURT: That's how it came off the computer?

4 MR. KOEHLER: Correct.

5 THE COURT: Okay. 305 is an image of a man kneeling
6 on the ground with a raised machete over him about to be
7 beheaded.

8 MR. MAYNARD: Defense objects to that one also.

9 THE COURT: Okay. I said I was going to leave 157
10 which also contains some images similar to these that I have
11 put aside to discuss the 403(b) objection.

12 The other one is 456.

13 MR. MAYNARD: Is 306 being offered or not?

14 MR. KOEHLER: It is not.

15 MR. MAYNARD: Is it withdrawn?

16 THE COURT: 307 has been admitted.

17 308, 309, and 310 have not been offered.

18 MR. MAYNARD: 306 is the one I'm looking at, Judge.

19 THE COURT: So 456 is one of those pixilated photos
20 of -- the central image is a man and you can see a few other
21 people and that's it.

22 But it's described as Nextbook Photo 8 Protest.

23 Am I missing something in this picture?

24 MR. KOEHLER: It is not an execution photo, Your
25 Honor.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 THE COURT: Is there an objection to 456?

2 MR. MAYNARD: It wasn't very clear. I thought it was
3 an execution photo.

4 If it's not an execution photo, I can't tell. That's
5 what it looked like to me, that there was a guy with a black
6 hood standing behind this fellow.

7 THE COURT: I guess that's another interpretation.

8 MR. KOEHLER: I believe those are his elbows, Your
9 Honor. He's got his hands up behind his head with his elbows
10 raised. He is like this. (Indicating)

11 THE COURT: To me it just looks like a guy with his
12 mouth open yelling something. I don't see any weapons. I
13 mean, he's not blind-folded. I can't tell what the black
14 image is behind him.

15 MR. MAYNARD: I thought the guy with the black image
16 had his arm around his neck and had a knife to his throat.

17 THE COURT: I don't see a knife.

18 MR. MAYNARD: The thing right below his neck.

19 MR. KOEHLER: That's a scarf.

20 MR. MAYNARD: I can't tell.

21 THE COURT: So what's the point of the photo? Why do
22 we need it? Isn't it cumulative?

23 MR. KOEHLER: This is off of Mr. Abdul Kareem's
24 Nextbook computer. It's not off the tower.

25 So what it does is it shows imagery that is

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 consistent with the philosophy, shall we say, of Simpson and
2 Soofi in terms of being upset about insults to the Prophet and
3 so on.

4 THE COURT: And the index which the jury -- or the
5 Table of Contents, whatever you want to call the exhibit list
6 that the jury will have, describes it as a protest.

7 MR. MAYNARD: Well, you can -- it looked to me like
8 it was a man standing there behind a fellow who's got his arm
9 around him. I thought he was going to cut his throat and that
10 he's yelling or screaming. And that there's a kid over there
11 to the left-hand side of the picture that's looking at it.

12 THE COURT: I think that's an imaginative
13 interpretation.

14 456 is admitted.

15 (Exhibit No. 456 admitted in evidence.)

16 MR. MAYNARD: Well, if it's not that, then it isn't
17 relevant.

18 THE COURT: Well, it's -- I think it's relevant. It
19 was on the defendant's computer and it appears, if the
20 government's description is correct, which is consistent with
21 my viewing of it, that it's someone, you know, protesting
22 something.

23 So, let's look at 157.

24 MR. KOEHLER: And, Your Honor, I wanted to draw the
25 Court's attention to something as we look at 157.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 We discussed last night one of the images in 157.
2 It's No. 34.

3 THE COURT: Right. You said you weren't going to
4 offer 34.

5 MR. KOEHLER: Because of the date and time of that
6 image, we have reconsidered on that particular image.

7 And so what we're proposing to do is put a box of
8 some kind in there and have that be the same as 291, 293, and
9 310; and that is, we come back to you with that one with a
10 proposed redacted version of it.

11 THE COURT: All right. So at the present time, 157
12 will not be admitted so long as the pages that are in the
13 original -- current original Exhibit 12 -- 31 and 32, 34, 36,
14 and 40 are as they appear in the current version of 157.

15 I detail all of those because the government has
16 already said that it wants to alter -- they call it "fuzz" --
17 the parts of those pictures.

18 And until we see what they look like that way, I
19 can't rule on it. So the only one that had been brought to my
20 attention yesterday that is still being offered to which an
21 objection previously was made is page 29 which, I believe, to
22 be the Jordanian pilot standing in the cage with his orange
23 shirt soaked in the accelerant that was used before he was set
24 on fire.

25 Are you objecting to that? Just that page?

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 MR. MAYNARD: It's just that page?

2 THE COURT: Just that page.

3 MR. MAYNARD: I'm not objecting to that.

4 THE COURT: Okay. So just to recap, page 12, 30, 31,
5 34, 36, and 40 have to be substituted. But before we take it
6 apart and substitute, I'll have to see it. Mr. Maynard will
7 have to see what they look like. And I can rule on them then.

8 The government has previously agreed to delete page
9 18 which is the Packman page.

10 And what you have provided to me over the lunch hour,
11 Mr. Maynard, contains those same pages plus a few more.

12 Let me just --

13 MR. MAYNARD: Judge, I apologize. They weren't
14 numbered. I started numbering, but I had gone through and put
15 yellow stickies next to the ones that I objected to. I think
16 they were fairly consistent with what the government --

17 THE COURT: Okay. I just want to review. The first
18 one you show is page 12 which I have already ruled on.

19 MR. MAYNARD: Yes.

20 THE COURT: The second one is page 18 which the
21 government is going to delete.

22 The next ones are pages 30 and 31 which the
23 government is going to resubmit.

24 MR. MAYNARD: Yes.

25 THE COURT: For some reason, Mr. Maynard's copy of

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 this exhibit has -- well, I think it's just a duplicate. Page
2 31 appears to be in there twice.

3 It's a February 5, 2015 at 1:50:30 --

4 MR. KOEHLER: Your Honor, there's actually three
5 pages of that.

6 MR. MAYNARD: The same --

7 THE COURT: Oh, I see. Three pages of the same
8 thing.

9 MR. KOEHLER: He tweets it three times.

10 THE COURT: Gotcha. I thought it was only two. Let
11 me just go back.

12 MR. KOEHLER: And I believe the first page of that is
13 29 and the page that you were talking about with the pilot
14 with the accelerant on his shirt is page 28.

15 THE COURT: Oh, okay.

16 MR. MAYNARD: I don't have a problem with 28, but I
17 do --

18 THE COURT: Okay. Let me revise what I said before.

19 28 -- I had misinterpreted that it was page 29 -- so
20 it's actually 29, 30, and 31 are going to be resubmitted.
21 They are all the identical photos but they're three separate
22 tweets.

23 The next one that you identified is 34 which is the
24 government's -- the government is going to resubmit it
25 altered.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 I think the next one is 36 that Mr. Maynard
2 identified. The government is going to modify it.

3 And then there's 40 which the government is going to
4 resubmit.

5 And now there's one additional page that Mr. Maynard
6 has marked from Exhibit 157 to which he has an objection. And
7 I don't know what page it is except to say that it's some
8 number of pages after 40 and it is a tweet from April 8, 2015,
9 at 8:32:09 a.m. And it is four photographs showing the
10 execution of a man dressed in what appears to be a blue
11 jumpsuit.

12 And I assume that your primary concern is with the
13 fourth picture?

14 MR. MAYNARD: Fourth picture.

15 MR. KOEHLER: We will obscure the fourth picture and
16 resubmit.

17 THE COURT: Okay.

18 MR. KOEHLER: That appears to be page 52 of the
19 exhibit.

20 THE COURT: So you think that's 52?

21 MR. KOEHLER: Yes.

22 THE COURT: Okay. Let me -- Maureen -- I don't want
23 to take Mr. Maynard's off, so I need to find it in 157 and I'm
24 going to mark it as page 52.

25 Okay. So I think the 403(b) question is how many

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 pictures of just before an execution do we need to have before
2 it becomes more prejudicial than probative?

3 And so we have some of those in 157. And then the
4 exhibits that I have reserved for the 403(b) discussion are
5 also of that same category. It's 289, 292, 297, 304, and 305.

6 MR. KOEHLER: Your Honor, there's a couple of things
7 in play here.

8 One is these are not merely offered to show the
9 states of mind of the individuals who were present in the room
10 watching these, but they're also present to corroborate
11 witnesses, one of whom hasn't testified yet, but will testify
12 that these kinds of things were playing nearly constantly in
13 the apartment.

14 And having different images of the same types of
15 scenes, although certainly they're not pretty, they are, in
16 fact, what was being played in the defendant's presence. And
17 that is what will be testified to by our witnesses.

18 In addition, obviously, we have the children would
19 have already testified to seeing these types of things played
20 in the defendant's apartment.

21 Limiting them to just a couple of those images takes
22 away from --

23 THE COURT: Hold on a minute. You said "being
24 played." Because these are -- I have been describing them as
25 "photographs." And that's what I believe -- aren't they all

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 photographs that were found on a computer that belonged to
2 Simpson or Soofi?

3 MR. KOEHLER: They are still images. Some of them
4 are screen captures. Some of them are, in fact, photographs.

5 THE COURT: I'm sorry. I see. Sometimes they're
6 described as a screencap from a video.

7 MR. KOEHLER: And don't hold me to precision on this,
8 but you will hear testimony from Ali Soofi that Simpson was
9 tweeting while Ali Soofi was in the apartment and Mr. Abdul
10 Kareem and Mr. Soofi were in the apartment.

11 And the tweet -- the Twitter feed was on the flat
12 screen TV inside the apartment and he was seeing these kinds
13 of things displayed on the screen when Mr. Simpson was
14 operational on Twitter. He also saw him doing the same thing
15 from his cell phone in Mr. Abdul Kareem's presence and talking
16 about it and the two of them laughing about it.

17 And so having these things in evidence will serve to
18 corroborate his testimony.

19 THE COURT: Well, maybe I need to hear his testimony,
20 because right now all I know is that they're screenshots from
21 videos or they're photographs or they're tweets from
22 Mr. Simpson which, if the idea of these is to show that
23 Simpson and/or Soofi were -- I'll just use the term
24 "radicalized" -- then we don't need this many pictures. If it
25 has to do with -- if it's tied directly to the defendant,

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 that's a slightly different analysis.

2 Because I think to this time, the evidence of what
3 Mr. Kareem actually may have been watching on a screen has
4 been -- has come in through the testimony of witnesses, the
5 young witnesses, and perhaps also the 19-year-old witness.
6 And I remember specifically it was a news -- the news report
7 on Fox which was the Jordanian pilot.

8 But I'm not sure that we've heard any specific
9 evidence of any images like this that were tied directly to
10 Mr. Kareem.

11 MR. KOEHLER: There were statements about beheading
12 videos, and specifically, Stefan Verdugo testified about
13 seeing beheading videos --

14 THE COURT: Okay. You're right.

15 MR. KOEHLER: -- that he was shown.

16 And I also believe that Sergio Martinez mentioned --
17 (Discussion had off the record.)

18 THE COURT: I don't -- my recollection of
19 Mr. Martinez, I don't recall him talking about videos.

20 MR. KOEHLER: I think it was Juan talking about the
21 13 people being executed.

22 THE COURT: Is that the people that are being marched
23 down the beach?

24 MR. KOEHLER: Three journalists being executed by 13
25 men. That's what it was.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 THE COURT: I'm sorry. The what?

2 MR. KOEHLER: Three journalists being executed by 13
3 men. Juan testified about that -- the juvenile.

4 THE COURT: Well, if he did, I don't remember. If he
5 did, I don't think it was that specific.

6 MS. BROOK: If I may, he did -- I'm sorry, Your
7 Honor.

8 He did testify additionally about the orange that the
9 journalists were wearing, the black outfits.

10 THE COURT: Right. I remember him talking about some
11 people that were wearing the orange outfits. I don't recall
12 him saying there were three journalists executed by 13 men.

13 MR. KOEHLER: I think he said there were three men
14 executed by 13 is what he said.

15 THE COURT: Okay.

16 MR. KOEHLER: In addition, Your Honor --

17 THE COURT: But we don't have those images?

18 MR. KOEHLER: Correct.

19 In addition, we have testimony that will come in
20 tomorrow through Agent Whitson about the defendant's admission
21 to having seen the Jordanian pilot video and claiming that the
22 others showed it to him.

23 THE COURT: Well, I'm not ruling on the Jordanian
24 pilot photos until such time as I see what you've made them
25 look like.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 MR. KOEHLER: Okay.

2 THE COURT: We have the Jordanian pilot's photos of
3 him standing in the cage soaked in whatever the accelerant
4 was.

5 MR. KOEHLER: Okay.

6 THE COURT: And then you're going to do something
7 with the remaining three; the two images repeated three times.

8 MR. KOEHLER: Correct.

9 THE COURT: I'm going to wait to hear what I hear
10 from other evidence -- or from other witnesses and then I will
11 rule on these. And then I have deferred ruling on --

12 Well, I have actually refused Exhibits 310, 291, and
13 290 to see what you come up with as their alternatives.

14 MR. KOEHLER: You mean 293? 290 was admitted without
15 objection.

16 THE COURT: Oh, did I mix -- I'm sorry.

17 Yes. I'm sorry. They were -- the two folders were
18 stuck together. It's 293 and 291 and 310.

19 Okay. Maureen, before I get them mixed up again,
20 here are the two that are admitted.

21 Can we talk for a minute about Mr. Kohlmann?

22 MR. KOEHLER: Yes. And I shall defer to my
23 colleague.

24 THE COURT: I just want to share some thoughts about
25 my review of his report. And let's clarify.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 The report that is his final report is the one that's
2 attached to the Government's Response to the Motion to
3 Preclude.

4 MS. BROOK: That's correct. It's a 31-page report.

5 THE COURT: And the one that Mr. Maynard attached is
6 almost the same as I saw it. The one attached to your
7 Response had -- I will say -- a few additional paragraphs. It
8 may have been two. It may have been three. But other than
9 that, it was the same.

10 There were no deletions from the report that
11 Mr. Maynard had attached, just those few additional
12 paragraphs.

13 MS. BROOK: Correct.

14 THE COURT: Okay. My thoughts about Mr. Kohlmann
15 before I hear any argument are these:

16 He is a qualified expert with respect to terrorism,
17 the leaders of various terrorist groups, the history of how
18 these groups came to be, some of the predecessor individuals
19 who inspired these groups and what I will call the -- the
20 "philosophy" doesn't sound like the right word, but it's the
21 best word I can come up with right now -- the philosophy of
22 these various terrorist groups.

23 I don't -- I know that Mr. Maynard's motion focused
24 on his lack of a scientific method, but he is not a scientist
25 in the hard sciences.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 His expertise is derived from his study over many
2 years of these subjects. And he is an expert the same way
3 that a historian can be an expert. They don't necessarily --
4 there's no scientific study done to become an expert, say, in
5 the history of the Civil War. It's because one has studied it
6 from all different aspects. And Mr. Kohlmann clearly, to me,
7 seems to qualify as an expert.

8 I think that the issue in this case is what the scope
9 of his testimony should be. And when you read his report, it
10 is very clear to me that his report gives an incredible amount
11 of information about these subjects that he knows so well.

12 That is not relevant here. My view, after reviewing
13 his report, is that the scope of any expert testimony that he
14 would give would have to be tied to things that were
15 discovered that relate to books, CDs, things on computers that
16 have been found in this case.

17 Mr. Kohlmann shouldn't be able to come and give the
18 jury some lecture that starts with the beginning of the
19 radical Islamic movement -- I think he started in Pakistan --
20 and talk to the jury about all of those things.

21 But it seems to me that it would be helpful to the
22 jury, for example, in Simpson and Soofi's vehicle -- or
23 Simpson's vehicle -- all of these CDs were found that, you
24 know, part 1 through 24, and what are they and who is the
25 person that is delivering these lectures and why is that

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 significant?

2 But if you were to examine him and he were to testify
3 based on all of this background information in his report, in
4 my opinion, it's highly prejudicial and to use a word
5 inappropriately, more or less "terrorize" the jury into
6 thinking that anyone who ever had any exposure whatsoever to
7 any of these people has to be a terrorist.

8 So those are my thoughts. I don't know that the
9 significance of some of the evidence that was found can be
10 appreciated by the jury without further explanation,
11 explanation that he's clearly qualified to give.

12 So that's my thoughts on Mr. Kohlmann.

13 I don't see that we need a Daubert hearing to
14 determine his qualifications as an expert. I don't know how
15 they can be doubted.

16 But what's -- and we wouldn't have an evidentiary
17 hearing on limiting his testimony, because that's not what a
18 Daubert hearing is about. That would be whether or not he was
19 qualified and whether his opinions were based on the types of
20 reliability standards that are required under Daubert and the
21 cases cited since then.

22 So do you think we need an evidentiary hearing for
23 Mr. Kohlmann, Mr. Maynard?

24 MR. MAYNARD: Judge, I wasn't prepared to discuss the
25 subject because I didn't think we were going to discuss it

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 today. But I mean --

2 THE COURT: Well, we don't have to discuss it today
3 if you don't want to. I'm happy to leave you with my
4 thoughts.

5 MR. MAYNARD: And I appreciate that.

6 Now, when I read Mr. Kohlmann's reports, I mean, it
7 seems to me that here is a man who has gone onto the Internet
8 and the problem is you can't verify the sources of some of
9 this stuff that he relies upon.

10 I don't disagree with you that he seems to have
11 knowledge about the history of these radical groups, al-Qa'ida
12 and various leaders.

13 Same kind of information I can find off of Wikipedia,
14 quite honestly, although --

15 THE COURT: Well, he seems to have more reliable
16 sources than that.

17 MR. MAYNARD: Well, I'm not so sure because I think a
18 lot of the information he says is that "I Twitter with
19 somebody." Well, you never know who is on the other side when
20 you're doing these things.

21 Contrary to your analogy to a historian, a historian,
22 if they're going to write a book about Gettysburg, they go to
23 Gettysburg. They get reliable diaries. They go to the scene.
24 And they study what actually happened at that particular
25 place.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 What Mr. Kohlmann seems to do is he goes onto the
2 Internet and he gathers information that comes down either
3 from e-mails, tweets, websites -- and as some of the books
4 that I have read over the past couple of months talk about
5 these websites from radical groups, it's like Whack a Mole. I
6 mean, they go up and then all of a sudden --

7 THE COURT: But we're only going to be talking about
8 one.

9 Now, I say that before the government says no, no, we
10 have to mention -- I mean, there might be some appropriate
11 background into who is ISIL, but we're not going to go back
12 and talk about al-Qa'ida in Arabia and the Taliban and all
13 those people that --

14 His report, to me, reads like -- to me it reads like
15 a report that he has produced numerous times and then he goes
16 onto his computer and adds paragraphs that are appropriate to
17 the case for which he has been retained.

18 MR. MAYNARD: I think that's absolutely the case.

19 And the defense is not arguing for a minute that
20 ISIS, ISIL, Islamic State, whatever, isn't a designated
21 terrorist organization. They are. I mean, there's no -- I'll
22 stipulate to that. That's not a problem.

23 THE COURT: But the problem is, Mr. Maynard, we have
24 Count 5 here where the government has to prove that there was
25 a conspiracy to provide material support to a foreign

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 terrorist organization.

2 And while there isn't going to be any dispute that
3 the Islamic State is a foreign terrorist organization, what it
4 means to provide material support to them depends in part on
5 what ISIL or ISIS is requesting that its followers provide.

6 And as I read his report, his opinion is that the
7 Islamic State, through some rather well-known spokespeople,
8 some of whom are dead, but apparently are still listened to,
9 are exhorting people to do the very type of thing that Simpson
10 and Soofi did and that that's what the Islamic State considers
11 providing material support to their cause.

12 And I think the government -- they have to prove
13 that. And I think they prove it through, in part, what this
14 expert can tell us about the Islamic State, the people who
15 have prepared and delivered their message, particularly, the
16 ones that delivered it in English, and to put that together
17 with the things that were discovered with Simpson and Soofi,
18 either in the car or in their apartment, that are those very
19 people that are encouraging the type of activity that they
20 engaged in.

21 MR. MAYNARD: The problem I have is that I think Mr.
22 Kohlmann, who testifies for the FBI all the time, over 30
23 times now, I'm concerned he's going to get up on this stand
24 and say, look, here's the history of these terrorist groups.

25 He can look to what Soofi and Simpson may have done.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 Their tweets. Who they were listening to. And he's going to
2 try to draw the conclusion that they were radicalized. I
3 think anybody can draw the conclusion they were radicalized by
4 the actions that they took in Garland, Texas.

5 The question is whether or not he's going to somehow
6 or another through that taint the jury towards my client.

7 I agree, the government has got a hoop they've got to
8 jump through and they're trying to do it through Mr. Kohlmann.

9 I'm just not sure that Mr. Kohlmann is the
10 appropriate person. I mean, when you look at his background,
11 he really hasn't talked about ISIS or ISIL. He's focused on
12 al-Qa'ida in the past, is one.

13 And two, his report leads me to believe --

14 THE COURT: Well, ISIS is new in comparison.

15 MR. MAYNARD: Well, it is, but it's been around for a
16 while. I mean, it's been around for four or five years.

17 THE COURT: Well, going back to my question.

18 What evidentiary hearing would we have regarding his
19 qualifications that aren't set out in his report and in his
20 curriculum vitae?

21 MR. MAYNARD: I will look at it and I will tell you
22 there is something else that I believe we should do.

23 THE COURT: But I am not going to permit Mr. Kohlmann
24 to basically testify the way he wrote his report. I don't
25 think that we start with whoever it was that -- where, you

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 know, he starts -- I don't have it right here either, but, you
2 know, he starts in Pakistan and then tries to say here is --
3 and here is how everybody evolved and here's how they
4 eventually become the Islamic State and they were kind of
5 dormant for a few years and now they started to become strong
6 when, I think, in 20 -- I don't know -- 2012 or something.

7 MR. MAYNARD: Thereabouts.

8 THE COURT: I think we start with what is the
9 significance of this disk? Who is Anwar al-Awlaki. You know,
10 that kind of -- that's where we are.

11 Most of the stuff that's in his report, he's not
12 going to be able to testify about, because that's the part
13 that I think would be incredibly prejudicial where the jury
14 would lose sight of what is it that they're trying to
15 determine.

16 What they're trying to determine is whether there was
17 a conspiracy, at least involving Simpson and Soofi, to provide
18 material support to terrorists.

19 I don't think there's too much doubt that Simpson and
20 Soofi were involved in a conspiracy to commit the crimes they
21 committed in Texas.

22 But it's Count 5 that can't be proved just by virtue
23 of the fact that they went to Texas and did what they did and
24 just by virtue of the fact that they had material that we
25 don't really know the significance of because we don't have

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 that expertise. Kohlmann does.

2 MS. BROOK: Your Honor, if I can just interject
3 briefly, and I think we are basically on the same page in
4 terms of what we anticipate Kohlmann's testimony to be.

5 Obviously, ISIS came from somewhere and they came
6 from AQI.

7 And so understanding a little bit of that evolution,
8 in part -- and obviously, it's a very, very small couple of
9 sentences of testimony -- puts into perspective where ISIS
10 came from. That's one component.

11 The second part would be obviously understanding the
12 historical significance and political significance of Anwar
13 al-Awlaki. And so that would involve a small portion of
14 history. But, again, this is not extensive testimony.

15 The government anticipates the bulk of the testimony
16 in this case to be, obviously, about the individual items of
17 evidence that were found and what those items of evidence
18 mean.

19 And I do concur. The report goes way back and talks
20 about all sorts of individuals and their chronological
21 evolution to the violent jihadi move and we're not here to
22 give, you know, a lecture to the jury about violent jihad.

23 THE COURT: Well, you may not be, but it sure appears
24 that that's what Mr. Kohlmann wants to do. If he wrote this
25 report for this case, that's clearly the way his report is,

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 like a graduate-level seminar in how radical Islam came to be.

2 MS. BROOK: And perhaps in part that's done as an
3 education factor for the individuals that read the report, not
4 necessarily based upon all of those parts of the report coming
5 into testimony.

6 So with that in mind, we've talked about Anwar
7 al-Awlaki. Azzam is also another individual. Pictures we've
8 seen admitted into evidence here about him and his role and
9 the importance.

10 So the pieces of history that we talk about, the
11 historical component will be slight, but it's all going to be
12 relevant to items of evidence that we found.

13 THE COURT: Well, the way I am envisioning it,
14 Ms. Brook, is that we actually start with the items of
15 evidence and then he explains the significance, if any, to how
16 this would be consistent with providing --

17 I mean, is he really here to testify about anything
18 other than Count 5? I mean, would we even need him if you
19 didn't have Count 5?

20 MS. BROOK: He certainly puts into perspective
21 certain items of evidence found in the conspiracy and the
22 collaboration, the theme that bound together these men. But
23 obviously, his probative value is Count 5, so that's why he's
24 here.

25 And as noticed in the government's expert notice,

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 there's also components of his testimony that are going to be
2 based upon just what Your Honor was speaking about; Junaid
3 Hussain and Miski, the individuals that are the Western
4 proponents or the Western propagandists that were in
5 communication and contact with the defendant's
6 co-conspirators.

7 So there are components of how ISIS works that will
8 be part of the testimony as well. But the government intends
9 for every single piece of the testimony to be relevant and
10 material to items in evidence and understanding this case.

11 THE COURT: Right. And so that's why I say the way I
12 see his testimony coming in is that, first, it's based on an
13 item of evidence that we need to understand who it is or what
14 their message is, as opposed to starting out by telling us who
15 all these people are, what their message is, what they want
16 people to do, and then following it up with, "Oh, and by the
17 way, I saw his picture on a computer" or "It's been reported
18 to me that the FBI saw his picture on a computer."

19 MS. BROOK: That's fine.

20 THE COURT: So if you want to talk more about this
21 tomorrow, Mr. Maynard, we can, but those --

22 MR. MAYNARD: I'll think about it overnight, Your
23 Honor.

24 Do you want to talk about the physical aspect of it?
25 I mean --

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 THE COURT: Well, that's another issue.

2 If you think there is to be an evidentiary hearing on
3 his expert qualifications, we need to know that very soon.

4 MR. MAYNARD: I've heard you. I understand where
5 you're going, but I'll let you know tomorrow.

6 THE COURT: But I think -- do you have an objection
7 to him appearing by VTC?

8 MR. MAYNARD: Here's the problem I have and I just --
9 I just learned of it today.

10 THE COURT: Well, obviously --

11 MR. MAYNARD: I didn't have any problem with the
12 other witness and in the abstract I don't.

13 Obviously, they probably prefer to have him here, as
14 would I, but the problem is impeachment. If I have material
15 for impeachment, I don't want to send it to him ahead of time
16 so he can see it.

17 THE COURT: I think we have -- actually, if he is on
18 the VTC at the courthouse in New York, I think there's a way
19 to put things on the document camera to link in. I know
20 there's -- no?

21 THE CLERK: I don't think so.

22 THE COURT: I'm trying to remember some way that I've
23 seen where our screen goes from being a person to a document.

24 MR. MAYNARD: I mean, that's really the only issue I
25 have. I don't have a problem with him testifying on a camera.

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 I just --

2 MS. BROOK: What we can also do, Mr. Koehler just
3 suggested, was to have Mr. Maynard ship the impeachment
4 documents that he has to the Clerk of the Court there in New
5 York and she can hand it to him after he testifies on direct.
6 And we can overnight it. We'll overnight it to them.

7 MR. MAYNARD: That might work.

8 THE COURT: It might work. Well, think about it.

9 MR. MAYNARD: I hadn't thought about it. I mean,
10 this was after the lunch hour and that's what I was trying to
11 think of.

12 THE COURT: Ordinarily, I wouldn't have a witness
13 like this by VTC, but these are rather extraordinary
14 circumstances and we can't delay the trial until he's fit to
15 travel.

16 MR. MAYNARD: No. It sounds to me like he probably
17 broke his shoulder skiing. I don't know. I don't know.

18 THE COURT: Okay. Is there anything else?

19 MR. MAYNARD: Yes.

20 THE COURT: Any other open issues?

21 MR. MAYNARD: I have one more issue.

22 My understanding is that Special Agent Whitson is
23 going to testify tomorrow.

24 I understand your rule, I believe, is is that only
25 one lawyer can cross-examine somebody. The issue that I would

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

1 ask the Court to consider is the way we have divided the cases
2 is the electronic information Ms. Plomin has mainly dealt with
3 and the other stuff that's simple I have to deal with.

4 I understand --

5 THE COURT: It seems like a wise division of labor.

6 MR. MAYNARD: Mr. Whitson may be testifying in both
7 areas. And I'm wondering, can we have permission to have two
8 people cross but on completely different areas.

9 THE COURT: I might make an exception to that rule,
10 but I won't allow two different people to object to his
11 testimony.

12 MR. MAYNARD: Okay.

13 THE COURT: And I won't allow you to -- if one of you
14 thinks the other didn't ask a question to, you know, overlap
15 each other.

16 MR. MAYNARD: I understand.

17 THE COURT: Okay. All right.

18 Court is in recess until nine o'clock tomorrow
19 morning.

20 (Proceedings adjourned at 2:35 p.m.)

21 * * *

CR15-00707-PHX-SRB JURY TRIAL-DAY #7 2-25-16

C E R T I F I C A T E

I, ELIZABETH A. LEMKE, do hereby certify that I am
duly appointed and qualified to act as Official Court Reporter
for the United States District Court for the District of
Arizona.

I FURTHER CERTIFY that the foregoing pages constitute
a full, true, and accurate transcript of all of that portion
of the proceedings contained herein, had in the above-entitled
cause on the date specified therein, and that said transcript
was prepared under my direction and control.

DATED at Phoenix, Arizona, this 1st day of August,
2016.

s/Elizabeth A. Lemke
ELIZABETH A. LEMKE, RDR, CRR, CPE